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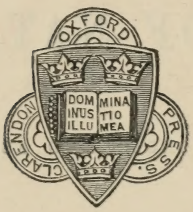
LAW OF NATIONS

CONSIDERED AS

INDEPENDENT POLITICAL COMMUNITIES.

London

HENRY FROWDE



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THE LAW OF NATIONS

CONSIDERED AS

INDEPENDENT POLITICAL COMMUNITIES.

ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE.

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BY

SIR TRAVERS TWISS, D.C.L., F.R.S.

MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW,
AND ONE OF HER MAJESTY'S COUNSEL.

A NEW EDITION, REVISED AND ENLARGED.

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PREFACE

TO THE SECOND EDITION.

The object, which the author has had in view in undertaking to treat of the Law of Nations, has been to present to the student of that branch of International Law, which is conversant with the Rights and Duties of Nations as Independent Political Communities, a systematic outline of the existing rules of international conduct, by which the harmony of the National State-System of Christendom is maintained, and to the advantages of which the Ottoman Empire was admitted by the Treaty of Paris (1856). The author makes no pretension to discuss any theories of International Ethics, as furnishing rules, by which the intercourse of independent States ought to be guided. He has been content to examine into the existing usages of State-Life, and to illustrate the modifications and improvements which they have undergone from time to time, whereby they have been adjusted to the growing wants of a progressive civilisation. Further he has taken occasion, where the subject-matter has permitted him, to analyse those usages, with a view to discover whether a given rule has been the result of an application of some principle of Right (Jus) to international relations, or is

merely the offspring of an instinctive appreciation on the part of independent political bodies of what is necessary for their existence, or is conducive to their mutual well-being.

The disappearance of small States from the National State-System of Europe, and more particularly of the minor Germanic States, which were recognised as members of the Family of Nations for the first time at the Peace of Westphalia, constitutes a most remarkable feature of change in the political map of Central Europe, as it was adjusted at the Congress of Vienna (1815) in accordance with what was then regarded as a *consensus gentium*. Since that Congress the States of Europe have been insensibly led to subordinate, by means of International Conferences, their particular interests to the general welfare of the European Community of States; so much so, that the present Age has been designated "the Age of Congresses," and certain writers have maintained that a consciousness of duty on the part of individual States towards the Community of States is a peculiar growth of the present century, and deserves to be noted as its distinctive characteristic. Whatever justice there may be in this view, it deserves remark, that the constitution of a New Germanic Empire and the unification of Italy have been accomplished without a Congress. On the other hand, changes in Eastern Europe, apparently not of so great importance as regards the European equilibrium, but nevertheless tending to the dismemberment of the Ottoman Empire, which was brought into alliance with

Christendom for the first time by King Francis I. of France in the early part of the sixteenth century with a view to establish an European equilibrium against the Emperor Charles V., have been held to require the sanction of a Congress. The explanation may be sought for in the circumstance that the independence of the new Kingdoms of the Lower Danube required international recognition, to say nothing of the fact that the fortune of war had entailed upon the Ottoman Porte the necessity of ceding to Russia certain districts on the Southern bank of the Danube, in exchange for which Roumania had to cede back to Russia certain portions of Bessarabia, which had been detached from Russia under the provisions of the Treaty of Paris (1856). The ink of this latter Treaty had not so entirely faded away as the ink of the Treaty of Vienna (1815), besides the ink of the First Protocol of the Conferences of London (1871) was still fresh, under which it had been solemnly declared to be an essential principle of the Law of Nations, that no Power can free itself from the obligations of a Treaty or modify its stipulations without the consent of the contracting parties by means of an amicable understanding. The various changes, which have taken place in the political organisation of the European State-System, and which may be said to have revolutionised the settlement of Vienna (1815), have been fully noticed in the three Chapters on the National State-Systems of Christendom, the Ottoman Empire, and the Kingdoms of the Lower Danube.

It is difficult to determine with precision the

degree in which Egypt may be considered to have been brought within the sphere of the Public Law of Europe by the admission of the Sublime Porte to the advantages of that Law and of the European Concert. *Qui sentit beneficium, sentire debet et onus* is a maxim applicable to States equally as to individual persons; and if Egypt is supposed to be entitled to the benefits of the Concert of civilised Europe she must be content to share its obligations. The growth of the Khediviate has been detailed in the Chapter on the Ottoman Empire, but a very cursory allusion has been made to the Suez Canal, as according to its original Statutes the Canal was, strictly speaking, a commercial enterprise, and its traffic was to be confined to merchant vessels to the exclusion of ships of war and naval transports; but it is obvious that the opening of a continuous water-way between the Red Sea and the Mediterranean, and the recent admission of ships of war to its navigation, have altered materially the character of what has been termed the Eastern Question. The project which the genius of Leibnitz first suggested to King Louis XIV. of France for effecting the conquest of Egypt, and for converting the Mediterranean Sea into a French Lake, with a view to counterbalance the preponderance of the House of Austria, has become eliminated from the category of practical politics by the opening of a maritime canal across the Isthmus, and by the fact of the Mediterranean Sea having thereby been made the highway of international commerce between Europe and the far East.

This result may give rise to juridical questions of novelty, which may require to be ultimately settled by a Congress, seeing that the principle, upon which the tariff of the Suez Canal had to be settled, has already been the subject of an European Congress under the presidency of the Sublime Porte. A more serious consequence, however, of the opening of the Canal will probably be found in the immediate friction that it will create between the Christian States of Europe and the uncivilised tribes of Islam, which occupy both shores of the Red Sea, the strain of which may jeopardise the general relations of amity between Christendom and the Mahommedan world, more especially if the successful revolt of the Soudanese, under the leadership of the Mahdi, should produce a schism in the Kaliphate. In consideration of these and other circumstances, which have brought the Ottoman Empire into direct relations with the various States of Christendom, the author has thought it useful to append a Chapter on the Capitulations of the Ottoman Porte. He has not, however, entered into any exposition of the details of those Capitulations, inasmuch as the details belong to a branch of International Law, which is beyond the scope of the present work. It may be useful also for the student to bear in mind that the Ottoman Porte in becoming a party to Article LXII. of the Treaty of Berlin (1878) has shown an increasing willingness on its part to adjust its civil institutions to the general European standard, at the same time that it has undertaken specific obligations in addition to the

general obligation, which it has incurred under the Treaty of Paris (1856).

Another question in connection with Africa has already assumed a prominent place *inter apices juris Gentium*, if I may so say, namely the capacity of private associations of a philanthropic character to accept cessions of territory with full rights of dominion from the native chiefs of Africa, so as to acquire for any settlements which they may establish in such ceded territory a *Status*, which in due course of time will warrant on the part of the nations of Christendom a recognition of such settlements as independent States. It is not disputed that Chartered Companies established for purposes of commerce are capable of acquiring an international *status* in cases where they have obtained cessions of territory with full rights of dominion from native chiefs. Examples which illustrate this position of Public Law in reference to Asia and America are too numerous to require citation. They abound in the far East, where chartered companies have been the pioneers of European civilisation; whilst on the shores of the Northern Continent of the Western Hemisphere voluntary associations of emigrants are found to have settled there, and to have acquired full rights of dominion by the side of chartered companies. In Africa, on the other hand, cases of voluntary associations establishing settlements on the coast are rare, and as long as the slave trade was the staple trade of the Western Coast, such settlements would have been out of place. It need not, therefore, excite any surprise

that, until the African slave trade had been placed under an international ban by the Congress of Vienna (1815), no private association should have ventured to form a settlement on the West Coast of Africa. In the year, however, immediately following the Congress of Vienna, namely in 1816, a private association of philanthropists was formed at Washington in the United States, under the title of "the American Colonisation Society for the establishment of free men of colour of the United States." After several failures this Association obtained in 1821 the cession of a considerable tract of territory, on the Pepper Coast of Upper Guinea, with full rights of dominion from the native chiefs. The Association thereupon established within their newly acquired territory a community of emancipated slaves, as the nucleus of a future State, which was supplied with ample funds for the maintenance of an orderly government under the direction of its founders down to the year 1839. In that year, or about that year, it would appear that an objection was raised on the part of one of the European Powers to the right of the Administrative Council of the Settlement to levy custom dues on foreign merchants trading with the Settlement, whereupon the Settlement, with the consent of the Association at Washington, declared itself to be an Independent State under the title of the Commonwealth of Liberia, and subsequently, in the year 1847, assumed the title of the Republic of Liberia. Its independence has since been recognised by the leading States of Europe and America,

including Portugal, with which power the Republic of Liberia concluded a treaty on the 4th of March, 1865, in which it was declared that by the laws of Portugal and of the Republic of Liberia the slave trade is assimilated to the crime of Piracy. Since Liberia has declared itself to be an independent republic, an adjoining settlement, which had been formed under similar circumstances, and was named Maryland, has made overtures to unite itself to Liberia, and those overtures are still under consideration. Meanwhile the Republic of Liberia has under its dominion an area of nearly 9,600 square miles with a population of about 18,000 civilised, and 1,000,000 aboriginal negroes. The political constitution of the Republic of Liberia, as settled in 1847, has been printed in the British and Foreign State Papers, vol. 35, p. 1301.

The first foreign recognition of the independence of the Republic came from Great Britain in 1848, when Lord Palmerston was Minister of Foreign Affairs, at which time President Roberts, of Liberia, came over to London from Monrovia, the capital of the Republic, to negotiate a treaty with England, and returned afterwards to Monrovia, where he ratified it as President [1]. As far, therefore, as precedents are concerned two instances may be cited within a comparatively recent time, which tend to shew that the juridical difficulty, which has been suggested to be in the way of private associations

[1] The author made the acquaintance of President Roberts, as he passed through Paris, having met him at dinner at the house of M. Drouyn de Lhuys.

forming settlements in Africa, and acquiring for their settlements full rights of dominion—the right of Empire over the territory ceded to them—is without foundation. The question has recently become one of practical interest in regard to the settlements established within the last few years in Central Africa, on the banks of the Upper Congo, by a philanthropic association, which has its head-quarters at Brussels under the title of L'Association Africaine Internationale. The analogy of its proceedings to those of the Washington Association is striking. In the first place the Washington Association had no mandate from the Government of the United States, and for good reason, because the Slave States of the Union possessed a political preponderance in 1816. In the second place, Liberia was founded to promote the emancipation of the negro slave, whilst Leopoldville, which may be regarded at present as the head settlement of the Brussels Association, has been founded to combat the slave trade. In the third place, Liberia remained for a quarter of a century or longer under the immediate direction of its founders, and was assisted from time to time with grants of money from their treasury. In like manner the various settlements of the African International Association are still subsidised by grants from the Association, and will continue to receive such support until their resources will warrant them in declining it. There is, however, a feature in the system of the Brussels Association, which distinguishes it from that of Washington. It exercises no political control over

its settlements on the Upper Congo further than that it has taken measures to secure that the frontiers of its settlements shall be open freely to the commerce of all the world, and that any stranger who may wish to establish himself at any of its stations shall be welcome to the same rights and privileges, to which the original settlers are entitled, on the sole condition of obeying its laws.

To enter further into a discussion of the difficulties which are supposed to beset the Congo Question, would be to travel into details, the full discussion of which would require a special treatise. The object of the author has been simply to elucidate a Question of Public Law respecting which there seems to be some confusion of thought amongst publicists, who have been embarrassed by the popular use of the term "Sovereignty" in works on International Law, where the term "full dominion" would have been more appropriate. The Roman jurists did not draw the distinction between the "dominium supremum" and the "dominium directum," which was adopted by the Feudalist School, who used the former term to denote "the Right of Empire," otherwise the Right retained by the Supreme Prince, who had devolved the "dominium directum" on the vassals of his Empire, when he granted to them portions of his territory. Hence the word "dominium," which the Roman jurists used to signify "ownership," has come down to our time with an uncertain meaning, imparted to it by mediæval usage, and since feudal tenures have been abolished, the "dominium directum" has been

merged as it were amongst the rights of property, whilst the "dominium eminens" of the Supreme Prince has been designated "Sovereignty," which has insensibly come to signify a personal relation between a Prince and his subjects, and not a juridical incident of territorial possession. The author has himself employed the term "dominion" as signifying something distinct from that of "empire" (p. 230) in accordance with the terminology of Grotius (lib. II, ch. 3, § 4, 2). International Law is obliged to be content with the lot of a younger brother, and is perplexed sometimes by the divergence between Roman Law and Feudal Law in the employment of words, to which Roman Law by right of primogeniture has affixed a scientific meaning, against which Feudal Law has not been disposed to rebel overtly, but with which it has tampered, and has transmitted them to us in a debased condition, which it is not within the power of every student to detect. The term "Sovereignty," however, ought not to cause any embarrassment to the student of the Congo Question. The Republic of Venice, at the time when it acquired rights of Empire over the Morea, and over most of the islands of the Ægean and the Levantine Seas, acknowledged no personal Sovereign. The Republic of France, which is acquiring rights of Empire in the present day over extensive territories in Western Africa, acknowledges no personal Sovereign. It is the *autonomy* of a State which is the criterion of its independence, not the circumstance of its being ruled by a Sovereign Prince; and it is a lingering tradition of a past age,

which suggests that none but Sovereign Princes or associations chartered by them can found settlements out of Europe, which will be entitled to claim international recognition, when they are sufficiently matured to maintain the character and to discharge the duties of independent states. That the rights of dominion in the sense of the "dominium eminens," as distinct from the rights of property, are capable of being acquired by private associations of a philanthropic character in Africa is, we think, established by the two instances of Liberia and Maryland, which we have cited, and the former of which has been recognised as a Member of the Family of Nations, not indeed by an European Congress, but after the example of the United States of America itself by a *Catena*, so to say, of separate treaties with the leading states of the civilised world.

TRAVERS TWISS.

TEMPLE, LONDON,
April 16, 1884.

INTRODUCTION

TO THE SECOND EDITION.

It was an apt remark on the part of his Excellency Kuo-Taj-in, the first Envoy-Extraordinary and Minister-Plenipotentiary accredited from China to the Court of St. James, that he found the European Law of Nations to be "a very young Law;" but he had also observed that since the age of Grotius wars had been less frequent in Europe, and less sanguinary. No higher compliment could well be paid to the writings of the great Dutch Jurist, than to attribute to them as a consequence what the discernment of his Excellency the Chinese Minister had noted as a remarkable coincidence, without perhaps being aware that the Treatise of Grotius on the Right of War and of Peace contributed in a marked degree to pave the way for the conclusion of the Peace of Westphalia. That event may be said to have laid the foundation of a new European State-System, by grouping for the first time together the States of Central Europe after the fashion of a family, the members of which were acknowledged to be independent, and, although of unequal power, were recognised as possessing an equality of Right. The realisation of such a State-System would have

been impracticable if Grotius had not previously familiarised the minds of Statesmen with the conception of territorial sovereignty and the rights of independence as incidental to such sovereignty, and further with the doctrine of the equality of States considered as independent political communities. These two principles were at the basis of the new Germanic Empire as constituted by the Peace of Westphalia, whilst the Treaties of Munster and of Osnaburg supplied the groundwork of an European Concert to maintain those principles.

There is a saying that right is the outcome of war, "la guerre enfante le droit." Perhaps it would be a less questionable paradox to say that wars give occasion for declarations of international right, precisely as civil tumults give occasion for the enactment of municipal laws. In accordance with such a maxim the Thirty Years' War may be said to have afforded to Grotius an opportunity, under the modest pretext of discussing the rights of war and of peace, for teaching mankind that there was a law distinct from the Law of Nature, which had been tacitly acted upon and generally received by all or by most nations, and which was for the advantage, not of any one nation in particular, but of all in general. To this law Grotius gave, for the first time, the name of "the Law of Nations," by way of distinction from "the Law of Nature," not as intending to deny the application of the great principles of natural law to the relations between Commonwealths, but wishing to reduce into a system the rules of intercourse, which were practised between Nations, instead of leaving the entire fabric to rest on general principles, the application of which might be maintained

or denied by each Nation in its transactions with its neighbours, according as it suited its convenience, or as the occasion might seem to warrant.

"I have employed," he says, "by way of evidence of the existence of this law, the testimonies of philosophers, historians and poets, and, in the last place, of orators, not that implicit credit is to be given to them, for it is usual for them to serve their party, or their subject, or their cause, but because when many persons at different times and in different places affirm the same thing for certain, that circumstance ought to be ascribed to some general cause, which, in the questions treated by us, cannot be any other than a correct inference from natural principles, or an universal consent. The former of these indicates the Law of Nature, the latter the Law of Nations, the difference between which must not be judged of from the language of their testimonies, for writers everywhere confound the terms 'Law of Nature' and 'Law of Nations,' but from the quality of the subject-matter, for whatever cannot be deduced by clear reasoning from certain principles, and yet appears to be everywhere observed, must have had its origin in the free consent of all." (Prolegomena, § 41.)

The treatise "De Jure Belli et Pacis" experienced much opposition during the lifetime of its author, and there have not been wanting, in England as well as on the continent of Europe, critics who have objected to the method of Grotius as well as to his doctrine, maintaining that the maxims which he inculcated as founded on the equality of nations went to destroy the three cardinal principles of the Civil Law, often quoted as "the Ulpianic precepts,"

to wit, "Honeste vivere, Alterum non lædere, Suum cuique tribuere;" further, that the doctrine of a Law of Nations, resting on the common agreement of mankind, was an empty fiction, to which nothing in fact really corresponds. But it was never intended by Grotius to set up a rule like that which theologians have termed the Golden Rule of Vincentius Lirinensis, "Quod semper et ubique et ab omnibus." The words of Grotius are,—"There are two ways of investigating the Law of Nations. We ascertain this Law, either by arguing from the nature and circumstances of mankind, or by observing what is generally approved by all Nations, or at least by all civilized Nations. The former is the more certain of the two, but the latter will lead us, if not with certainty, yet with a high degree of probability, to the knowledge of this Law; for such an universal approbation must arise from some universal principle, and this principle can be nothing else than the common sense or reason of mankind." (L. I. ch. i. § 3.)

With regard to the method of Grotius, which is for the most part inductive, and perhaps somewhat disorderly, the nature of the subject demanded at his hands that he should frequently cite examples from the history of mankind, to illustrate and support his application of general principles of law and politics, whilst an entire separation of the principles of natural law from those of ethical science would not have been very feasible, perhaps not altogether desirable for his purpose. The best answer, however, to those who condemn his work as having no definite stamp or character, is found in the fact that it was received as an authority by learned Professors

in the Protestant Universities of the Continent within thirty or forty years after its first publication, whilst the universal assent of the civilized world to its teaching, with the exception always of Rome, the buttress of the system which the Thirty Years' War had shattered, affords a solid proof of the reality of the truths which Grotius proclaimed, and of his method of expounding those truths being well suited to the age in which he lived.

The Treatise of Grotius was first published at Paris in 1625. Its full title was "Hugonis Grotii de Jure Belli et Pacis, libri tres, in quibus Jus Naturæ et Gentium, item Juris Publici præcipua explicantur." A quarter of a century had hardly elapsed before, in the same country which had produced Selden's "Mare Clausum," in objection to the "Mare Liberum" of Grotius, a treatise appeared in support of the more important work of the great Dutch Jurist, entitled "Juris et Judicii Fetialis, sive Juris inter Gentes et Quæstionum de eodem explicatio." Its author was Dr. Richard Zouch, who had been appointed Regius Professor of Civil Law in the University of Oxford by King James I, and Judge of the High Court of Admiralty by King Charles I. Although he did not approve the Solemn League and Covenant, Dr. Zouch did not object to continue to hold several high appointments under the Commonwealth. He was eminently distinguished for his knowledge of the Roman Civil Law as well as of International Law, in both of which branches of law his writings were in high estimation, and recommended him to the Protector Cromwell as a very fit person to sit amongst the Delegates appointed to try Don Pantaleon Sa, who having, with the aid of

his servant, deliberately killed a British subject, one Greenaway of Lincoln's Inn, on the new Exchange in London, had taken refuge in the hotel of his brother, the Portuguese Ambassador at the Court of St. James[1]. The language of Dr. Zouch in dividing the Law which regulates the relations of princes or states with one another into natural and positive law, is free from all ambiguity. "When many persons," he says, "affirm the same thing at different times, that fact ought to be referred to some universal cause, which cannot be any other than a right conclusion drawn from the principles of nature, or a general consent, of which the former indicates the Law of Nature, the latter the Law of Nations." Thus far the doctrine of Dr. Zouch is in complete harmony with that of Grotius, but he could not overlook the fact that there was growing

[1] A dispute having arisen between the Protector Oliver Cromwell and the Portuguese Government, in consequence of the brother of the Portuguese Ambassador having been tried and executed for the murder of Greenaway, Dr. Zouch published a treatise entitled, "De Legati delinquentis Judice competente Dissertatio," which was printed at Oxford, according to the title-page, "Oxoniæ. Excudebat Hen. Hall, Academiæ Typographus, Impensis Tho. Robinson, 1657." A copy of this treatise is in the Author's possession, on the fly-leaf of which, before the title-page, are inscribed at the top the words, "Reade ex dono authoris," and beneath them, in a more modern hand, the following memorandum: "In 'The Memoirs of the Protectoral House of Cromwell,' by Mark Noble, vol. ii, p. 52, it is said that 'Colonel John Gerard was beheaded for having engaged with others his relatives in a plot to assassinate Oliver Cromwell. It is singular the brother of the Portuguese Ambassador died the same day for killing a gentleman, whom he mistook for this Colonel.'" Reade, to whom the duodecimo volume was presented by Dr. Zouch, was probably Thomas Reade, Fellow of New College, Oxford, and Principal of Magdalen Hall and a Doctor of Laws of the College of Advocates. Dr. Zouch was also a Fellow of New College and Principal of Alban Hall, Oxford, and likewise a Doctor of the College of Advocates. His name is sometimes spelt with a final "e," which accounts for his being termed in Latin "Zouchæus."

up, outside the circuit of the unwritten Law of Nations, founded on general custom ("inveterata consuetudo") a body of written law contained in treaties and conventions, which could not well be overlooked in a treatise professing to treat of the "Jus inter Gentes," whether those treaties were intended to supplement the defects in the unwritten or common law, or whether they were intended to modify it and to accommodate it to the progress of civilisation. To this branch of law he assigned the title of *positive*, as distinguished from *natural* law. "Deinde," he says, "præter mores communes pro jure etiam inter gentes habendum est, in quod gentes singulæ cum singulis consentiunt, utpote per pacta, conventiones et fœdera." In other words, the "Jus inter Gentes" of Dr. Zouch is a more comprehensive body of rules of intercourse between nations than the "Jus Gentium" of Grotius. The Law between Nations, as treated by Dr. Zouch, comprises both the unwritten law, founded on general custom, and a written law, ancillary or exceptional to the unwritten law, founded on treaties and conventions. It is not, however, every treaty which marks a stage of development or progress in the Public Law of Europe. Some treaties are merely declaratory of a rule of the unwritten law, which risks to be forgotten, others are simply exceptions to the general rule, but the majority of treaties indicate, as it were, the set of the current of public opinion as to what all nations would do well to agree to observe.

Dr. Zouch's work was published in 1650. Within a quarter of a century after that event Professor Rachel, of the University of Kiel, a diplomatist of note, who took part, as the Envoy of the Duke of

Holstein Gottorp, in the Congress of Nimeguen, published two Dissertations, "De Jure Naturæ et Gentium," in which he formally distinguished Conventional Law from Customary Law, and assigned to the former division the title of "Jus Pactitium." Puffendorf, who had from the commencement combated the distinction which Grotius had so carefully made between the Law of Nature and the Law of Nations, and who held the customs and usages, which nations generally observe, to be perfectly arbitrary unless they are deduced from the Law of Nature, did not hesitate to reject altogether the more comprehensive view of the "Jus inter Gentes," which Dr. Zouch had inaugurated, considering the "Jus Pactitium" to be not properly the subject of Science, but to belong more to the province of History than of Law. Materials, however, were fast accumulating to form a suitable subject for scientific treatment, and in the early part of the eighteenth century there appeared from the Press, in different parts of Europe, various collections of Treaties and Conventions. Leibnitz had given an impulse to the study of treaties by his "Codex Juris Gentium Diplomaticus," published by him in 1695, which he re-edited in a more enlarged form in 1700, accompanied by a second part, under the title of "Mantissa Codicis Juris Gentium Diplomatici." About the same time there appeared, at Amsterdam, a collection of Treaties in 4 vols. folio, edited by Jaques Bernard, sometime afterwards Professor in the University of Leyden. This was, however, only the prelude to a far larger collection comprised in the great work of Jean Dumont, entitled "Corps Universel Diplomatique du Droit des Gens," in

8 vols. folio, published at Amsterdam in 1726–31, a supplement to which, in 2 vols., was added by J. Rousset in 1739. John Jacob Schmauss had also published, in 1730, a collection, in two volumes, of treaties, principally of the two preceding centuries, under the title of "Corpus Juris Gentium Academicum," so that the materials for the study of *positive* as distinguished from *natural* law, was most ample in 1749, when Christian von Wolff once more vindicated, against all opponents, amongst whom Christian Thomasius, of the University of Halle, was the most formidable, the superiority of the School of Grotius, and moulded the system of European Public Law into the more complete forms in which it now exists; namely, under the threefold division of Natural Law, Customary Law, and Conventional Law.

Christian von Wolff had reached his seventieth year when he composed a work, the title of which fully explained its subject-matter, "Jus Gentium Methodo Scientifica pertractatum, in quo Jus Gentium Naturale ab eo, quod Voluntarii Pactitii et Consuetudinarii est, accurate distinguitur." Von Wolff introduced into his system of Public Law a distinction between the "Jus Naturale" and the "Jus Voluntarium," with a view to greater precision, in pursuance of a theory of international society, according to which the family of Nations, constituted as a "Civitas Maxima," has a right to impose upon its members certain laws in their common interest, and to compel them to observe them. It has been objected to Von Wolff, that in resting the obligation of his "Jus Gentium Voluntarium" on an imaginary Family of Nations, he has been

misled by his excessive desire to demonstrate everything, inasmuch as history does not supply evidence of any such universal association; nay, it may be argued that the theory is irreconcileable with the rights of independence, one of the attributes of Sovereign States. But the error of Von Wolff was more an error of form than of substance. He perceived that the European Nations, although juridically independent as communities, were morally dependent upon one another in respect of the satisfaction of their mutual wants by friendly intercourse, and that such intercourse could only be permanently maintained under conditions of reciprocity, which gave rise to the formation, as it were, of an "Inner Circle" of the more civilised nations, regulating their mutual intercourse by rules not applicable to the "Outer Circle" of Nations in a less cultivated State. The members of this inner circle of international life constituted the "Civitas Maxima" of Von Wolff, shadowed out somewhat indistinctly by him, and perhaps constructed on too fictitious a basis to stand the test of strict analysis.

The great feature, however, of Von Wolff's system, which made the appearance of his work an epoch in the science of the Law of Nations only second to that of Grotius, was that he taught that the Law of Nations could not be applied to States or Political Communities simply as aggregate bodies of individual men. Hobbes and Puffendorf were of one mind in maintaining that the Law of Nature, as applied to the relations of individual men as moral agents, underwent no modification in its application to States or Nations, and in contending that the maxims of the Law of Nature and of the Law of

Nations were identical. On the other hand, Barbeyrac, who translated the work of Grotius into French, and enriched it with critical annotations of great value, has observed in one of his notes that although the principles of the Law of Nature are identical with those of the Law of Nations, there is a difference in the mode in which those principles are applicable to States, as distinguished from individuals. Von Wolff developed this doctrine more fully. Having admitted that Nations are in one sense aggregate bodies of individual men, upon whom certain duties are obligatory, and to whom certain rights attach in respect of the personality of the individuals, he maintained that, as Nations are composite bodies and have in their collective capacity a moral being of their own, and are in such character the subjects of obligations and rights, which result in virtue of the Law of Nature from the act of association, under which they are constituted political bodies, it follows that the nature of their moral being differs essentially from the nature of the physical individuals, of whom they are composed. When, therefore, we seek to apply to Nations the duties which the Law of Nature prescribes to individual men, and the rights which it confers on the latter in order to enable them to fulfil their duties, since such duties and such rights cannot be otherwise than consistent with the nature of their subjects, they must in their application necessarily undergo a change suitable to the new subjects to which they are applied. Thus it results that the Law of Nations cannot be in every particular the same as the Law of Nature regulating the actions of individual men.

The authority due to the original work of Von Wolff has, by a caprice of fortune, been transferred to the lighter and more agreeable work of M. de Vattel, who has acknowledged, in his Preface, his obligation to the great philosopher of the University of Halle. M. de Vattel, however, was not a blind follower of Von Wolff. He combated his theory of a "Civitas Maxima" or Great Republic of Nations, whose laws, according to Von Wolff, dictated by sound reason and founded on necessity, should regulate the alterations to be made in the natural and necessary Law of Nations, as the civil laws of a particular State determine what modifications shall take place in the natural law of individuals. In opposition to that theory Vattel undertook to show, that all the modifications and restrictions which the rigour of the natural law must be made to undergo in the affairs of Nations, and from which the voluntary Law of Nations is formed, are deducible from the natural liberty of nations, from the attention due to their common safety, from the nature of their mutual correspondence, their reciprocal duties and the distinctions of their various rights. "Since Nations," he goes on to say, "in their transactions with one another are equally bound to admit those exceptions to and modifications of the rigours of the necessary law, whether they are deduced from the idea of a Great Republic, of which all nations are supposed to be members, or derived from the sources above enumerated, there can be no reason why the system, which thence results, should not be called the voluntary Law of Nations, as distinguished from the necessary, internal and consciential Law. Names are of very little consequence, but it is of con-

siderable importance to distinguish these two kinds of law, in order that we may never confound what is just and good in itself with what is only tolerated through necessity."

Von Wolff and De Vattel may be said to have exhausted the subject of the natural Law of Nations by patiently observing the actual relations of Nations, and by carefully analysing those relations and inferring from them general rules and principles. What chiefly remained to be done was to combine those principles with the results of established usage and of treaty engagements.

Leibnitz, as already mentioned, had given an impulse to the study of treaties in the early part of the eighteenth century. The Conventional branch of the Public Law of Europe may in fact be said to have grown up almost entirely since the Thirty Years' War, so that in the time of Grotius it was not of sufficient importance to arrest his attention or to require a special treatment at his hands. Within a century however after the Thirty Years' War, contracts of alliance and treaties of peace had come to be recorded so frequently in history, that there was a mass of positive Law defining the special relations of most of the European States towards one another, and exceptional to the general Law, so that it became necessary to reduce it into a systematic form in order to master the study of the entire system of European Public Law. During the eighteenth century the Cabinets of Europe were averse to any collective publication of their treaties, and when an eminent German jurist, John Jacob Moser, projected a great work in 1780, which was intended to embrace the whole circle of European

State Affairs since the death of the Emperor Charles VI. (1740), the Cabinets of the Sovereigns of Europe were closed against his proposals, and he accordingly abandoned his design. His scheme, however, was revived before the conclusion of the eighteenth century by George Frederic von Martens, Professor of Law in the University of Gottingen, who distinguished not merely the Law of Nature from the Law of Nations, but the general Law of Nations from the practical Law of Nations as received in Europe, showing how the European system of Public Law rests not merely on general abstract principles, but also on the usages and conventions of the European States ("Primæ lineæ Juris Gentium Europæarum practici," Gottingen, 1785). It is not too much to say that in accordance with the maxim already quoted, "La guerre enfante le Droit," the twenty years of almost uninterrupted warfare, during which the First Napoleon endeavoured to erect an Empire, only second to that of Charlemagne, on the foundations of the French Republic of 1793, evoked a spirit of combined action amongst the Nations of Europe, cemented by a carefully considered system of General Treaties, the outcome of which has been an European Concert of Public Law. It has resulted accordingly that each State, besides its special interests, has also interests in common with the general body of States, and the natural independence of the individual States has been, in certain matters, subordinated to the general welfare of the European community. The methods whereby this result has been brought about, which has involved from time to time departures from the established usage, has been by consultations amongst

the leading European Powers assembled in Congress, and recording in the Protocols of their Conferences the principles upon which their conclusions have been based, to which it has been usual to invite the adherence of the Powers not represented in the Congress. Where those conclusions have been of a remedial character as regards any defect of the Customary Law, a general adherence has for the most part been given to them, and the Customary Law of Europe has thus been accommodated to the growing wants of an advancing civilisation. For instance, by an annexe to the Principal Act of the Congress of Vienna of 1815, it was agreed that the navigation of great rivers separating or traversing more than one State, should be open to every one for purposes of commerce from the point where such rivers become navigable, to the point where they discharge their waters into the sea, subject always to moderate navigation dues; and to this convention all the Christian States of Europe have acceded, so that the Common Law of the Christian States of Europe, as to each nation's exclusive right of empire over its territorial waters, has been modified, and is subordinated to a conventional rule in respect of a certain class of rivers. The term "Christian States" has been used here for the sake of convenience, as distinguishing the States of Europe which took part in or acceded to the Principal Act of the Congress of Vienna, from the Ottoman Porte, which was not a party to that Act. On a later occasion, however, namely under the Treaty of Paris of 1856, the Ottoman Porte has been formally admitted to all the advantages of the Public Law of Europe and of the European Concert ("aux avantages du Droit

Public et du Concert Europeens"), and under the same treaty, to which the Porte itself was a signatory party, it was agreed that the same principles of Law, which had been applied by the Powers assembled at Vienna in 1815 to rivers traversing or separating the territories of more than one State, should be applied to the river Danube, and it was declared that this arrangement with the Ottoman Porte forms part of the Public Law of Europe and is under its guaranty. Respecting the operation of such treaties, where their provisions are of a remedial character and have a beneficial end in view, the question whether or not their provisions are to be extended to other nations not parties to the treaties, may involve very nice considerations of international jurisprudence, as the answers must depend on certain considerations of Right ("Jus") outside the treaties.

No difficulty, however, can arise in interpreting the Act of the Congress of Vienna, as it is in terms provided "that the free navigation of the class of rivers specified in the annexe shall not be interdicted to any one, so that the navigation of such rivers may be properly held to be open to the subjects of all nations. But there may be cases of greater complication. For instance, under the Declaration of Maritime Law annexed to the same Treaty of Paris in 1856, certain relaxations of the Customary Law of Nations in time of war have been agreed upon for the benefit of neutrals. There is, on the other hand, a special proviso that the Declaration shall not be obligatory except between the Powers who have signed it or shall accede to it. But the second article of the Declaration provides,

in derogation of the Common Law of the Sea, as recorded in the Consolat del Mar, that the neutral flag in time of war shall cover enemy's cargo with the exception of contraband of war; and the third article provides that neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag. It has been suggested by an American publicist of note, that if a nation that is a party to the Declaration should be at war with a nation which is not a party to it, the former nation would not be bound to abstain from seizing enemy's goods on board of a vessel under the flag of a neutral nation which is a party to the Declaration, and "thus in fact all parties to the Declaration, when they are neutral, may lose the benefit of it in such a war." But both France and Great Britain, the two Powers with whom the Declaration originated, have in practice put a liberal interpretation on the second and third articles, which is calculated to relieve all neutrals, which have adhered to the Declaration of Paris, from any fear of losing the benefit of their adherence to it under the circumstances of such a war. For instance, in anticipation of a joint war against China, which latter Power has not adhered to the Declaration of Paris, France and Great Britain, as allies in the event of such a war, issued, in the month of March, 1860, each of them an Ordinance or Decree as to the observance of the Rules of Maritime Law, under the Declaration of Paris of 1856, towards the vessels and goods of the enemy and of neutrals, and they announced that as regards the ships of any neutral Power party to the Declaration, the flag of such Power should cover the enemy's goods with the exception of contraband of

war, and further, that the goods of neutrals, with the exception of contraband of war, should not be liable to capture under the enemy's flag, by reason only of the said goods being under the enemy's flag. A like interpretation of the Declaration of Paris has been adopted by the Republics of Peru and Chili, in 1865, in a war against Spain, which latter Power has not adhered to the Declaration of Paris, so that, unless these precedents should be disregarded, it may be presumed that the Declaration of Paris is to be interpreted in the most liberal manner as regards neutrals in time of war, so as to accord with the preamble which recites that the object of the Powers which were parties to the Declaration was to render war as little onerous as possible to neutrals. The same liberal interpretation of the second and third articles of the Declaration was adopted by the French Government in the war with Prussia of 1870–71. By the ninth article of the French instructions of 25 July, 1870, the commanders of the French cruisers were directed not to examine cargo on board of neutral vessels for the purpose of ascertaining its ownership, nor to seize neutral merchandise on board of enemy vessels, with the exception of contraband of war, and these principles were declared to be applicable to Spain and to the United States, notwithstanding those Powers had not adhered to the Declaration of Paris.

On the other hand, the same Declaration of Paris supplies an instance in which, in accordance with another acknowledged principle of general jurisprudence, where a clause of a written instrument is of a prohibitive or restrictive character, it must be continued strictly. Thus, the first article of the

Declaration is in terms "Privateering (La Course) is abolished;" in other words, the article prohibits, to all the Powers which are parties to the Declaration, the granting of Letters of Marque. Accordingly, when the King of Prussia issued a decree on 24 July, 1870, constituting a Volunteer Naval Force to be under the same discipline and under the same articles of war as the German Federal Navy, and to sail under the Federal flag, Great Britain held that the institution of such a volunteer navy did not involve any breach of the first article of the Declaration of Paris, and that the French Government, which had by a "note verbale" invited the attention of Great Britain to the subject, had no sufficient cause to call upon the British Government to object to the decree of the Prussian Government, as infringing the Declaration[1]. With regard to the Declaration itself, whilst it imposes no obligation on the States which have declined to adhere formally to it, wishing to preserve their full liberty of action under the necessities which war may impose upon them, the probability is that they will in time conform themselves to a restriction of the practice of warfare on the High Seas, which, although it may be authorised by the customary Law of Nations, is now discarded by the public opinion of so many of the foremost States of the civilised world.

John Louis Klüber, Professor in the University of Heidelberg, and subsequently Councillor of State to the Grand Duke of Baden, was present, under the authority of his Government, at Vienna during the sittings of the Congress in 1815, and had oppor-

[1] British and Foreign State Papers, vol. lxi, p. 692. Perels, Manuel de Droit Maritime International, p. 194.

tunities of becoming acquainted with the important diplomatic questions discussed in the Congress, and the solution given to them. The result was a publication on his part of a collection of the Acts of the Congress of Vienna, in nine volumes, which is the text-book on the subject. It had, however, been preceded by a work from his pen entitled "Le Droit des Gens Moderne de l'Europe," which appeared in Paris in 1818. The object of this work was to give an impulse to the study of the *Positive* Law of Nations, as a help to his contemporaries, who might be intending to devote themselves to the public service of their respective States, and more especially to the study of the Diplomatic Science. It is usual to speak of Diplomacy as an art, and in this sense of the term to describe a skilful negotiator of a treaty as an able diplomatist. But just as there is a Science of Logic as well as an Art of Logic, so there is a Science of Diplomacy as well as an Art of Diplomacy. When Leibnitz published his "Codex Juris Publici Diplomaticus," he invited attention to the treaties and other international acts of the European Powers as a branch of the Public Law of Europe, with which it was necessary for Statesmen to become familiar, before they undertook to direct the foreign relations of their respective States. In order, therefore, that a statesman should have any just claim to the title of a Diplomatist, in the Leibnitzian sense of the term, he must have acquired a competent knowledge of the treaties and other international acts of the European Powers, and of the motives that have led to them; and before he can expect to be regarded as a sagacious Diplomatist he must have become sufficiently familiar with the prin-

ciples of international jurisprudence, as to be able to distinguish between the provisions of treaties and other international acts, the application of which ought to be restricted to the subjects of the signatory Powers, and acts, of which the benefit is to be extended to the subjects of other Powers. It is in this sense of the high vocation of the Diplomatist that the founders of the Chichele Professorship at Oxford have entitled it the Professorship of International Law and Diplomacy. For instance, under an annexe to the First Protocol of the Treaty of London of 1871, the European Powers, who took part in the Congress of Paris of 1856, have joined in a Declaration, namely, that it is an essential principle of the Law of Nations (Droit des Gens), that no Power can release itself from the obligations of a treaty, except in pursuance of the assent of the contracting parties by means of an amicable understanding. It may be asserted with some reason that this protocol is simply declaratory of the pre-existing Law of Nations, but if that be granted, a question may be raised in what sense are we to interpret the phrase "Law of Nations"? Are we to extend its meaning as widely as Professor Bluntschli, who has laid it down that "International Law is not restricted to European nations. Its domain extends over the whole surface of the globe"? or shall we adopt Professor Frederic de Martens' view, that reciprocity is a cardinal principle of contemporary international Law, and that the application of the Law of Nations, as a system distinguished from the Law of Nature, is confined to such civilised States as recognise in their international relations the obligations of reciprocity. It should be borne in mind that amongst the parties to this Declaration

were the Padichah of the Ottomans and the Emperor of all the Russias, both of which Powers are Asiatic as well as European Powers, and that as Asiatic Powers they have territories abutting on the territory of semi-civilised States, to say nothing of the fact that the Queen of Great Britain and Ireland, who was also a party to the Declaration, has also, as Empress of India, territories conterminous with those of semi-civilised States. Professor Frederic de Martens, in his valuable work recently published under the title of "Traité de Droit International[1]," contends that the relations between civilised and semi-civilised States are prescribed by Natural Law, that is, by a definite body of principles derived from the moral nature and the reason of man, whilst contemporary International Law is the result of civilised life, and does not extend beyond the nations which recognise the fundamental principles of European civilisation. According then to this restricted view of International Law it would seem that the phrase "Law of Nations," as it occurs in the protocol of the Treaty of London of 1871, may properly be taken to signify the Consuetudinary Law of Europe, of which the Signatory Powers recognise the binding force, as regards their treaty-engagements with other Powers. This limited interpretation of the Declaration leaves untouched the maxim of Natural Law, that plighted faith is to be maintained even towards semi-civilised peoples, who are outside the pale of contemporary international law; and Professor Frederic de Martens participates in this view of Natural Law, as prescribing the obligation of good faith towards semi-

[1] Traduit du Russe par Alfred Leo. Paris, 1883.

civilised peoples. The great value of the Declaration of 1871 is that it formally repudiates the doctrine of Spinoza, that "States are not bound to observe their treaties longer than whilst the interest or danger, which first gave rise to the treaties, continues to exist."

If it be assumed, then, that "the Law of Nations" referred to in the Declaration of London of 1871 is the Consuetudinary Law of the European Nations, which all the civilised States of the Western Hemisphere have recognised as the Law of Nations, it is not too much to say that this Law of Nations, as distinguished from the Law of Nature, is a rule of international conduct sanctioned by a practice, which has been found to conduce to the general welfare of the community of civilised States, which reason has moulded in conformity with the progress of civilisation, and the observance of which is obligatory upon every Nation that claims to participate in the common advantages of that civilisation. It is the special province of the international jurist to make himself acquainted with this Law of Nations, and to appreciate the principles which underlie it, so that if cases arise from time to time which are without any direct precedent to govern them, he may be enabled to suggest to the Statesman a principle of Public Right, which will meet the particular difficulty without impairing the general harmony of the edifice of Public Law. In such matters a clear appreciation of the *terminus a quo* is often indispensable to assure the attainment of the *terminus ad quem*. It is not, however, the vocation of the international jurist to determine by what considerations of general interest the Statesman should

be governed in choosing his line of political action; his functions are limited to advising the Statesman, whether this or that course of political action will be in accordance with International Right, or will entail a violation of it.

With regard to the title of the present work, it has been adopted from a desire to adhere to an ancient terminology, and in much the same spirit in which Vattel observes, that names are of very little consequence, so long as the kind of law which they denote is kept distinct in the mind. The phrase "international law," which is due to the philosophical genius of Bentham, if it had been adopted by the author, might have led the reader to expect to find many subjects discussed in the present work, respecting which complete silence has designedly been maintained. On the other hand, the author is unable to assent to the objection raised against the term "Law," as applied to the Rules which govern the intercourse of Nations, on the ground that there is no common Superior to enforce their observance. An eminent Russian jurist, who represents a State respecting which there is a prevalent superstition in Western Europe, that no such thing as voluntary law is known there, has combated with abundant reason, the argument that because there is no constraining power to enforce the observance of International Right, it has no obligatory force so as to be entitled to the designation of "Law." Consent, as Professor Frederic de Martens shows, is the basis of all order and of all right, and precisely as the Law of a State is founded on the consent of its members, expressed through its legislature, which embodies the juridicial convictions of the political

community, so the Law of Nations rests in the consent of Nations (*consensus gentum*), testified by their established practice (*inveterata consuetudo*). On the other hand, an eminent German jurist, M. de Jhering, has published some remarkable treatises[1] in support of the *thesis*, which is considered in England to have the high recommendation of Mr. John Austin's approval in his well-known work "The Province of Jurisprudence determined," that where there is no Superior Power there is no Law; but M. de Jhering admits the fact, that the strongest Power does not prolong eternally a struggle with its adversary, and that it is fain sooner or later to conclude peace, and peace is the basis of all order and of all right, whilst peace presupposes consent. Unfortunately the poverty of the English language obliges us to use the term "Law" to designate "unwritten Right" (*Jus non scriptum*) equally as written Law (*Lex*); but Bracton, in his Commentaries on the Laws and Customs of England, composed more than six centuries ago, feeling himself pressed with a like difficulty, was of opinion that there was nothing unreasonable in his using the term "Lex" to designate the unwritten laws of England, seeing that they were approved by the consent of the magnates and the common warrant of the body politic. Bracton, it may be justly said, first made public the principles and rules of the unwritten law of England, hitherto known only to the King's judges, and his work closes the epoch of Customary Law in England; whilst Chief Justice Hengham, whose "Summa" occupies historically the

[1] Der Kampf im Recht, 1872. Der Zweck im Recht, Leipzig, 1877.

next place to that of Bracton, instead of quoting the ancient judgments of righteous men as evidence of customary law, appeals to the recent constitutions of the Parliament of King Edward I, as instituted law, which had modified the customary law and adapted it to the altered circumstances of the age. The same reign, however, which ushered in a new era of written law in England, did not discard the use of the term "Law," as applied to Customs, seeing that it has transmitted to us the Customs of the Sea, as embodied in the judgments of the Maritime Court of Oleron, under the title of "*La Leye Oleroun,*" and we still speak of those Customs as "the Laws of Oleron."

In conclusion, it may be justly said that the Law of Nations, although it has no law-giver to enact it, nor supreme judge to enforce it, is not the less a reality. The history of modern civilisation demonstrates its existence, and the public opinion of mankind affirms its obligation. It has been the object of the author of the present treatise to set forth the usage and custom of Nations as the best evidence of the extent to which abstract principles may be applied in elucidating the Law, which was proclaimed by Grotius two centuries ago, and the development of which has been the occupation of several of the greatest jurists of each successive age. It is a bright feature of modern civilisation that the Governments of Europe allow in their intercourse with one another considerable weight to a rule of Right as controlling the dictates of ambition or of interest, and that their respect for such Right commends itself to the conscience of the Nations which they represent. No human society has ever long

subsisted, or ever can long subsist, without being bound together by good laws, much less the Great Society of Nations. It has been the signal merit of the Statesmen of Europe, who have had charge of the international interests of their respective States during the last half century, that they have agreed to modify the customary Law of Nations from time to time so as to adapt it to the enlightened demands of an advancing civilisation. The consequence has been, that however indeterminate in a certain sense are the rules of that Law, it is a Law of the Living and not of the Dead, and whilst there will always be much question about the details of its application, its flexibility as customary law will always preserve it from becoming obsolete. Meanwhile, those who by genius and study are capable of mastering its principles, and of applying them with discernment to the maintenance of a sound public opinion, where questions of Right and Wrong are at issue between Independent States, are in substance although not in form the true law-givers of Nations in this respect. They can however claim no supreme authority for themselves, but must rest satisfied with commending their views of international obligation to the reason of Statesmen, and to the conscience of mankind at large.



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THE LAW OF NATIONS.

CHAPTER I.

NATIONS AS SUBJECTS OF LAW.

Nations independent political Communities—Science of the Law of Nations—Element of Roman Law—Definition of a State adopted by Grotius—Puffendorf's Definition of a State—Christian de Wolff—Vattel's Definition of a State—Growth of Natural Society—Natural Society of Nations—Nationalisation and Denationalisation of States—Hobbes' view of political Society—Equality of Nations—Perfect and Imperfect Rights of Nations—Rights incidental to the Right of Self-preservation—Obligations corresponding to Rights—The good offices of Nations discretional—Right of Coalition.

Nations, independent political Communities.

§ 1. The term *Nation*, in its primary and etymological sense, denotes a race of men, in other words, an aggregate body of persons, exceeding a single family, who are connected by the ties of a common lineage, and perhaps by a common language. In a secondary and political sense the term Nation signifies a society of persons occupying a common territory, and united under a common government, in other words, a Commonwealth or State. It is from this latter point of view that we regard Nations, when we speak of their mutual intercourse being governed by certain rules, which are of paramount obligation, and from the operation of which no Nation can withdraw itself, without renouncing at the same time the fellowship of other Nations. Those rules, being of universal application, admit of scientific investigation, and may be reduced to method; and the science which is conversant with those rules is the Science of the Law

of Nations, in other words, International Jurisprudence.

Science of the Law of Nations.

§ 2. The Science of the Law of Nations may be accordingly defined to be the Science of the Rules which govern the International Life of States. All States however do not enjoy International Life. Thus the States which constitute the North American Union do not exercise individually any international action, either in relation to one another or in relation to foreign States. The States which form the Helvetic Confederation are under similar conditions, as well as the Christian States of the Ottoman Empire, which have not been recognised under the Treaty of Berlin of 13th July, 1878, as Independent States. On the other hand, the States which composed the Germanic Confederation of 1815 were both Germanic States and members of the European family of Nations; but after the withdrawal of Austria from that Confederation, the States which have formed themselves in 1871 into a new Confederation under the name of the German Empire, have ceased to be members of the European family of Nations, and are simply States of the German Empire.

Element of Roman Law.

§ 3. We must not expect to find in the works of the earlier writers on Public Law any very complete definition of the elements, which impart to a State the character of a Nation. Amidst the total disorganisation of the European State-System consequent on the Reformation and the religious alliances of the Thirty Years' War, Grotius found no element remaining either in the Feudal or in the Ecclesiastical Body of Law, upon which he could venture to build up a system of permanent relations between Nations. He fell back accordingly upon those views of a State-System to which the early Jurisprudence

of Rome had given authority, and framed his definition of a State upon the classical model which exists in Cicero's treatise on Political Law[1]. The treatise itself, in which the original definition occurs, was not indeed before the eyes of Grotius, as it was lost sight of in Western Europe towards the close of the twelfth century[2], and the fragments of the Vatican Palimpsest, from which the original text has been partially restored, were only deciphered in the earlier part of the present century; but the definition of a State in the identical language of the great Roman Jurisconsult, and as falling from the lips of Scipio Africanus himself, had been embodied by St. Augustine in his "City of God[3];" and was transmitted therein to the Jurists of the 17th and 18th centuries. It has been conjectured by the learned cardinal Angelo Maii, the decipherer of the Vatican Palimpsest, that the perusal of Cicero's treatise first suggested to St. Augustine the idea of his incomparable Work. However that may be, the stamp of St. Augustine's approval, having been impressed upon the conception of the great Roman Jurisconsult, commended it with additional force to the acceptance of Grotius, who, in seeking to construct for the first time a system of Public Law upon the combined basis of Natural Right and Universal Consent, was anxious to keep in sight as many as possible of the great landmarks, which the pioneers of

Cicero de Republica.

S. Augustinus de Civitate Dei.

[1] Est igitur, inquit Africanus, respublica res populi; populus autem non omnis hominum cœtus quoquo modo congregatus, sed cœtus multitudinis juris consensu et utilitatis communione sociatus. De Republica, Lib. I. c. 25.

[2] John of Salisbury in the 12th century is the last writer in Western Europe, who seems to have had access to the original text of Cicero's treatise.

[3] De Civitate Dei, L. XIX. c. 21. St. Augustine adds, "ubi ergo non est ista justitia, profecto non est cœtus hominum juris consensu et utilitatis communione sociatus."

Juridical Science had set up, and which had hitherto connected International Jurisprudence with general Morals.

Definition of a State adopted by Grotius.

§ 4. Grotius has accordingly defined a State in these words; "Est autem civitas cœtus perfectus liberorum hominum juris[4] fruendi et communis utilitatis causa sociatus[5]." It has been remarked by Barbeyrac in his annotation to this passage, that Grotius has followed Aristotle in defining a State to be a *complete Society*, in other words, a Society containing within itself all that is necessary for living commodiously and happily. But a more important variation from the classical model may be observed in the substitution of *liberorum hominum* for *multitudinis*, a substitution which implies the freedom of the individual man in a natural state. It is this freedom of the individual man, which forms the keystone of the arch upon which the whole system of Grotius rests. A State accordingly, in the contemplation of Grotius, is a *complete body of free men* associated together for the enjoyment of Right and for the common good.

Puffendorf's definition of a State.

§ 5. Puffendorf, on the other hand, whose object was to identify the Law of Nations with a system of Moral Right based solely on Natural Law, in opposition to the system of Grotius, has thus defined a Civil State: "It is a compound Moral Person, whose will being united and tied together by those covenants which before passed amongst the multitude, is deemed the will of all, to the end that it may use

[4] *Jus* or Right (Droit) has been defined to be The External freedom of the Moral person. Neque enim *Juris* nomine aliud significatur, quam libertas, quam quisque habet, facultatibus naturalibus secundum rectam rationem utendi. Hobbes de Civ. c. 1. § 7.

[5] De Jure Belli et Pacis, L. I. c. 1. § 14.

and apply the strength and riches of private persons towards maintaining the common peace and security[6].

The classification of a State under the head of a Moral Person for the purpose of assimilating its rights and duties to those of a Natural Person involves a *metaphysical* conception of the Being of a State. Puffendorf's definition will accordingly afford no assistance in an inquiry in which the *real* or *constituent* elements of a State are the subject of investigation. The special merit of Puffendorf is that he was the first to maintain that natural right and international right are not restricted to Christian nations, but are a bond between all Nations, of whatever religion they may be, inasmuch as every Nation is a moral unit of the great human Society.

Christian de Wolff.

§ 6. Christian de Wolff, the master of Vattel, does not pause to define a Nation, but commences his treatise on the Law of Nations by defining its subject to be the science of the Right, which Nations or people enjoy in relation to one another, and of the obligations corresponding to it. "Scientiam juris quo gentes sive populi inter se utuntur et obligationum eidem respondentium[7]." But, in thus defining the science which he proposes to discuss, De Wolff has indirectly indicated wherein the character of a Nation consists, when he speaks of the Right, which Nations or peoples enjoy in relation to one another, and the obligations corresponding to it. It is in the capacity of a people to fulfil the obligations of Natural Society towards other peoples without the consent of any political superior, that we discover the true characteristic of International Life. No political body, which

[6] Law of Nature and of Nations, B. VIII. c. 14. § 13.

[7] Jus Gentium Methodo Scientifica pertractatum. Prolegomena, § 1.

does not possess a perfect liberty of action in such matters, can be in permanent relation to other political bodies; for such permanent relation implies the mutual discharge of the duties of Natural Society, and such mutual discharge can only have permanent place between political bodies, which can freely reciprocate good offices, in other words, between political bodies which are *sui juris* and not subject to any political superior.

Vattel's definition of a State.

§ 7. Vattel at the immediate outset of his work has defined Nations or States in identical terms, as "bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength[8]." He then engrafts upon this real definition a metaphysical conception of the Being of a State, analogous to Puffendorf's notion. "Such a Society has its affairs and its interests; it deliberates and takes resolutions in common: thus becoming a Moral Person, which possesses an understanding and a will peculiar to itself, and is susceptible of obligations and rights." He afterwards falls back into the track of De Wolff, and defines the Law of Nations to be the Science of the Right which has place between Nations or States, and the obligations corresponding to that Right; and further, as he proceeds to examine that Right and the corresponding obligations, he characterises Nations as *Sovereign States*[9], which are to be considered as *so many free persons* living together in a State of Nature. "It is a settled point," he observes, "with writers on natural law, that all men inherit from Nature perfect liberty and

[8] Droit des Gens. Prélimi-naires, § 1.

[9] In the sense of *territorial* sovereignty, that is, absolute dominion over a certain territory.

independence, of which they cannot be deprived without their own consent. In a State the individual citizens do not enjoy them fully and absolutely, because they have made a partial surrender of them to the Sovereign. But the body of the Nation, the State, remains absolutely free and independent with respect to all other men and all other nations, as long as it has not voluntarily submitted to them [10]."

Growth of Natural Society.

§ 8. Man is so constituted by Nature, that he cannot supply all his own wants, but requires the intercourse and assistance of his fellow men, either for his immediate preservation, or for the perfection of his Being. The experience of communities on this head confirms what the instinct of the individual man suggests. There is accordingly in human nature a tendency towards society, and whenever opportunity presents itself, men are found to associate themselves together for the purpose of mutually aiding and assisting one another. There thus grow up spontaneous relations of Natural Society amongst men. The law of this Natural Society is that each individual should do for the others every thing which their welfare requires, and which he can perform without neglecting the duty which he owes to himself, and this obligation of Natural Society is co-extensive with the human race [11]. The Universal Society of the human race being thus an institution of Nature, all men are bound to cultivate it, and to discharge its duties; and they cannot release themselves from that obligation by any convention, or by any private association. When, therefore, men unite themselves in Civil Society for the purpose of forming themselves into a State, they may enter into positive engagements towards one another individually, and

[10] Préliminaires, § 4.

[11] Préliminaires, § 10.

towards the State as a community, but they continue still to be under the obligations of Natural Society towards the rest of mankind. The mode of discharging these obligations may be influenced by the institution of Civil Society, inasmuch as the individual members of a political community having agreed in certain things to act in common, and having resigned their rights, and submitted their will to the common body in every thing which regards their welfare as a community, the duty of discharging the obligations of Natural Society towards strangers, in all matters wherein the liberty of the individual members has been restricted, devolves upon the common body; in other words, upon the State. There thus grow up spontaneously relations of *Natural Society amongst States*, the purpose of which is the interchange of good offices between political communities for their mutual preservation, and for the advancement of the happiness of one another. Political communities participate in this Natural Society, as free and independent bodies of men, under conditions analogous to those under which individual men participate in Civil Society. "As men," writes Vattel, "are subject to the laws of Nature, and as their union in Civil Society cannot have exempted them from the obligation to observe those laws, since by that union they do not cease to be men, the entire Nation, whose common will is but the result of the united wills of the citizens, remains subject to the laws of Nature, and is bound to respect them in all its proceedings [12].

Natural Society of Nations.

§ 9. International Society is thus in its elementary condition the most enlarged phase of Natural Society, wherein men hold intercourse with one another, not individually and immediately as in Civil Society,

[12] Préliminaires, § 5.

but collectively and by representation, the Body of men, of which a political community consists, holding intercourse with other like Bodies of men through the medium of the State, the internal organisation of which is immaterial, provided it represents the Civil Society for all international purposes. It is necessary for this end, that a State should possess all the qualifications for Natural Society, which the individual members of it inherit from Nature, and should be able to perform towards other States every thing which their welfare requires, and which it can effect without neglecting the duty which it owes to its own members. A State must therefore for the purposes of International Society be free and independent of all other States, in like manner as individual men are by nature free and independent of one another. *Independence* is accordingly the fundamental element which imparts to a State the character of a Nation. A Nation is in fact a political body, capable of discharging without the consent of any political superior the obligations of Natural Society towards other political bodies; and of regulating in concert with them the mode of discharging those obligations, either as regards the mutual action of the communities themselves, or as concerns the intercourse between individual members of them.

Nationalisation of States.

§ 10. A State is admitted into the fellowship of Nations either *overtly* by the recognition of its Independence in some Public Act on the part of the Established Powers, or *tacitly* by being allowed to be a contracting party to a Public Convention entered into with the Established Powers. Thus the States of the Roman Empire of the Germans, upon the signature of the Treaty of Westphalia, became *de jure* members of the European family of Nations. Their

Treaty of Westphalia.

capacity to make conventions among themselves and with non-Germanic Powers, without the political sanction of the Emperor and the Empire, had been under the VIIIth Article of that Treaty explicitly recognised by the established Powers, and so became part of the Public Law of Europe. On the other hand, the Federal Union of North American States was *de facto* recognised as a Nation by France, when Louis XVIth concluded the Treaties of Paris, (Feb. 6th, 1778,) with the Envoys of the Thirteen Provinces; and by the Low Countries, when the States General concluded the Treaty of the Hague with them, (Octr. 8th, 1782); and the claim of the Union to be generally regarded as a Nation, became indisputable from the day when the Mother Country acknowledged *de facto* her former dependencies to be *sui juris* by entering into international engagements with the Federal Union. (Treaty of Versailles, Sept. 3, 1783.)

Denationalisation of States.

On the other hand, the Denationalisation of a State ensues, upon its ceasing to have the capacity to enter into engagements freely with other Nations, whether it has voluntarily renounced its capacity, or has been deprived of it by a superior Power. Thus the Republics of the Valais and of Geneva, and the Principality of Neuchatel, voluntarily renounced their capacity to enter into treaty-engagements with foreign powers upon their admission into the Union of Helvetic States[13], and the separate Nationality of each State was thenceforth merged in the common Nationality of the Federal Union. On the other hand, the princes of the Germanic Empire who were mediatised upon the formation of the Confederation of the Rhine, (July 12, 1806[14],) were interdicted by the independ-

Confederation of the Rhine, July 12, 1806.

[13] Martens, Nouveau Recueil de Traités, IV. p. 168.
[14] Ibid. VIII. p. 488.

ent members of that Confederation, to whose sovereignty they had been made respectively subject, from entering into treaty-engagements with Foreign Powers. They accordingly ceased to occupy the place in the family of Nations, into which they had been admitted by the Treaty of Westphalia.

Hobbes' view of political society.

§ 11. Hobbes has adopted a view of the origin of Political Society, according to which no community would be entitled to be regarded as a Nation, unless it were adequate to maintain its independence against all external assault by its own intrinsic strength[15]. Such an idea of independence as applicable to Political Societies, however tenable it may be in abstract theory, will be found in practice to be too absolute, as there are weaker and stronger members of the family of Nations, and the weaker members owe the maintenance of their independence to the mutual fears and jealousies of the more powerful Nations, whilst on the other hand the stronger members could not maintain themselves single-handed against the combined assault of the weaker Nations. A State is entitled to be regarded as independent, if it be not *de jure* dependent upon any other State for its freedom of political action.

Equality of Nations.

§ 12. The independence of a Nation is absolute, and not subject to qualification, so that Nations in respect of their intercourse under the Common Law are Peers or Equals[16]; and their rights and obligations are under that law reciprocal. Power and weakness do not in this respect give rise to any dis-

[15] Necessarium itaque est ad securitatem quam quærimus obtinendam, ut numerus eorum, qui in mutuam opem conspirant, tantus sit, ut paucorum hominum ad hostes accessio non sit ipsis conspicui momenti ad victoriam. De Cive, c. 5. § 3.

[16] Vattel, Préliminaires, § 18. Heffter, § 27. Klüber, § 89. Wolff, § 16.

tinction, and the Principality of Montenegro is as much an independent State as the Empire of all the Russias. It results from this equality, that whatever is lawful for one Nation is equally lawful for another, and whatever is unjustifiable in the one is equally unjustifiable in the other.

As independence is an essential condition of Nationality, a Nation will be justified in doing or practising whatever is necessary for the maintenance of its independence. The right of self-defence is accordingly a primary right of Nations, and it may be exercised either by way of resistance to immediate assault, or by way of precaution against threatened aggression. The indefeasible right of every Nation to provide for its own defence, is classed by Vattel amongst its *perfect rights*.

Right of Self-defence.

Perfect and Imperfect Rights of Nations.

§ 13. The distinction which Vattel has drawn between the perfect and the imperfect rights of Nations may be conveniently noticed here. "The perfect right," says Vattel[17], "is that which is accompanied by the right of compelling those who refuse to fulfil the corresponding obligation; the imperfect right is unaccompanied by that right of compulsion. The perfect obligation is that which gives to the opposite party the right of compulsion; the imperfect only gives him the right to ask. The right is always imperfect, when the corresponding obligation depends on the judgment of the party in whose breast it exists, for if in such a case we had a right to compel him, he would no longer enjoy the liberty of determining as to the conduct which he should pursue, in order to obey the dictates of his own conscience. Our obligation is always imperfect with respect to other people, as long as we possess the

[17] Droit des Gens. Préliminaires, § 17.

liberty of judging how we are to act, and we retain that liberty on all occasions on which we ought to be free." A perfect right alone would thus seem to be the subject of Law. An imperfect right is a subject of *Comity*.

§ 14. Accordingly, a reasonable fear of danger to its own independence, is held to justify a Nation in having recourse to war in order to prevent attack. This right of a Nation to preserve itself from injury by anticipating attack, is a perfect right. It is *the right of security*, and is incidental to the right of self-preservation. When an injury has been inflicted, the same right of self-preservation authorises the injured Nation to obtain complete reparation, and to employ force for that purpose. This may be termed *the right of indemnity*.

Rights incidental to the right of self-preservation.

Right of Security.

Right of Indemnity.

The right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end[18]. Thus a Nation, after it has been attacked and has worsted its enemy, will be justified in taking precautions against a second attack by depriving its enemy of the means of renewing his aggression. The justice of all war depends upon the principles involved in the right of security and the right of indemnity. Whatever strikes at those rights strikes at the Perfect Rights of a Nation, and is a just cause of war.

§ 15. Every right which a Nation possesses under the Common Law has its corresponding obligation. The right of security accordingly involves the obligation of self-restraint, so as to avoid encroaching on the independence of other States, and the right of indemnity involves the obligation of granting redress. A Nation is mistress of her own actions as long as

Obligations corresponding to Rights.

[18] Wheaton's Elements, pt. II. c. 1. § 1.

they do not affect the perfect rights of other Nations. It owes as a duty to itself, in the first instance, and in preference to all other Nations, to do every thing that can promote its own happiness and perfection, but it must not overstep the limit beyond which it cannot pass without impairing the happiness and perfection of another Nation. On the other hand, when a Nation cannot contribute to the welfare of another Nation without doing an essential injury to itself, it has reached the limit of its natural obligations towards that Nation, and it is considered to be under a disability to perform any further good offices towards it.

The good offices of Nations discretional.

§ 16. Every Nation is entitled to form its own judgment whether it can perform towards another Nation any good office without neglecting the duty which it owes to itself[19]. Treaty-engagements however may control the exercise of a Nation's free judgment in such matters, for a Nation may voluntarily wave some portion of the liberty, which is by Nature inherent in it. In all cases, however, in which a Nation has the right of judging what its duty requires, no other Nation can compel it to act in this or that particular manner; for any attempt at such compulsion would be an encroachment on the independence of that Nation. It is otherwise where a Nation has voluntarily bound itself to perform a particular good office towards another Nation; in such a case it has exercised its independence as a Nation when it contracted the particular engagement, the strict fulfilment of which has become henceforth a matter of good faith, and not a sign of dependence.

Right of Coalition.

§ 17. Since Nations are independent communities holding intercourse with one another on terms of

[19] Vattel, Préliminaires, § 16.

equality, every Nation is at liberty to regulate its own actions by its own sense of duty within the sphere of its perfect Rights. Hence a Nation is on many occasions under the obligation of allowing certain things to be done by another Nation, although it may disapprove the same, because it cannot prevent them by force without violating the independence and equality of that Nation, and so destroying the foundation of the Natural Society of Nations. The laws on which that natural society rests are of such paramount importance to the safety of all Nations, that if a more powerful State were at liberty upon its own view of justice or expediency to set them aside in regard to a weaker State, no Nation could rely with any security upon the preservation of its own existence. But every Nation has a perfect right to those things which are necessary to its preservation, and every State enters into the Society of Nations upon that understanding. All Nations have accordingly a right to combine their strength for the purpose of repressing any one or more Nations, which seek to infringe any cardinal rule of international life [20]. The exercise of that Right however must not extend beyond those limits which the interests of Natural Society mark out; it must be in its turn so regulated, as not to prejudice the independence of the Nation, which has provoked the interference of its Compeers.

[20] Vattel, Droit des Gens, L. II. § 53.

CHAPTER II.

INCIDENTS AND MODIFICATIONS OF INTERNATIONAL LIFE.

Continuity of International Life—Determination of International Life—International recognition of Independence—International Life not determined by political changes within a State—Personal Treaties—Real Treaties when affected by political changes—Sovereignty distinct from Independence—Semi-Sovereign States a Solecism—Conventional Independence of States—Independent States under Protection—The Principality of Monaco—The Lordship of Kniphausen—The United States of the Ionian Islands—Neutrality of a Protected Independent State—The Free City of Cracow—Its internal Constitution a subject of treaty—Cracow and the Ionian Islands—The extinct Republic of Poglizza—The Republic of Andorre—The Republic of San Marino.

Continuity of International Life.

§ 18. THE peculiar objects of the Law of Nations being the external relations which exist between independent political Communities, considered as entire communities, it is immaterial for the purposes of that law, what may be the internal organisation of such Communities, further than to ascertain in what portion the Supreme Power resides; for the Supreme Power controls the entire Community, and the will of the Supreme Power is the will of the Community itself in matters of external, equally as of internal, law. The Supreme Power of a State is termed the Sovereign Power properly, in reference to the members of the State who are subject to it; but publicists have sometimes used the term Sovereign Power in a metaphorical sense, to denote the entire State or Nation, viewed from without, and the Law of Nations has accordingly been defined by them to be the law

which regards the conduct of Sovereign Powers in relation to one another; the intercourse between States or Nations being, as a matter of fact, carried on between the Sovereign portions of them [1]. Hence the person of the Sovereign, or Chief of the State, has been taken to represent the whole Community, and has become identified with it for purposes of negotiation and treaty. It is immaterial for international purposes what may be the peculiar organisation of the Sovereign Power within a State. For instance, whether the Chief of the State be an hereditary or an elective Monarch, whether his tenure of office be for life or for a term of years, whether his power within the State be exercised absolutely according to his own will or under limitations according to established rules, may be considerations of high importance to the subject members of each State, but are matters which do not concern other States or Nations. It is however of concern to other States or Nations that the international life of a State should not be interrupted by any change of internal order, as for instance, by the natural or political demise of the Chief of the State. Hence in States where the most absolute form of Monarchy has prevailed, and where the person of the Prince has been as closely as possible identified with the State itself, the Sovereign Power has nevertheless been distinguished in law from the person of the Prince, and the international relations between two such States have been considered to be maintained *de jure* between the two Crowns. Treaty-engagements between such St tes have accordingly not determined upon the natural or political demise of the Princes, who were the original parties to the treaties, but have been considered to

Absolute monarchies.

[1] Austin on Jurisprudence, p. 208.

attach to their Crowns, and the obligations of the treaties have devolved to their successors in the Sovereignty. In other forms of State-Government, the internal constitution of which allows direct negotiation with other States to be carried on in the name of the State itself, the continuity of the external life of the State has been equally exempt from any interruption by internal changes.

Determination of international life.

§ 19. There are however circumstances under which the international life of a State may determine. Thus a State may be merged in its entirety in another State, and become a province or department of that State; or it may be incorporated into a system of States, and become clothed with the Nationality of the Union. Thus the kingdom of Navarre has been merged in the kingdom of Spain, and has become a province of that kingdom; whilst the Duchy of Burgundy has been similarly merged in the kingdom of France: on the other hand, the Principality of Neuchatel and the Republic of Valais have both been incorporated into the Union of Helvetic States, and have severally ceased to maintain independent relations with Foreign Powers. Again, a State may undergo division, and be converted into two or more independent States; or it may be broken up, and its fragments may be absorbed into the neighbouring States. Thus the kingdom of the Netherlands underwent division in 1831, and was converted into the two independent kingdoms of Holland and of Belgium; whilst the kingdom of Poland has been broken up and its fragments absorbed into the three neighbouring States. The international life of a State may determine at its own will, or by conquest, without the sanction of other States; but the transformation of an independent State into two or more independent

The kingdom of the Netherlands.

States, in other words, the creation of a new independent State, is not complete until other Nations have recognised its National character. It is the quality of Independence for the first time asserted on behalf of a State, which requires recognition on the part of other Nations, not the increased or diminished extent of its territorial possessions. A State may indeed notify to other States any important additions to its territorial limits, which it may have acquired either by occupation or by cession; but such notifications are matters of courtesy for mutual convenience, and the announcement of the fact of any such acquisition is not obligatory upon the State which makes it. Thus the United States of North America might have annexed the territory of Texas, and might have thought fit to notify to other nations the addition of a new State to the Union; but the question of right was complete upon the admission of Texas into the Union under a Resolution of Congress, and the annexation required no recognition from third parties to give it effect. On the other hand, the transformation of the ancient kingdom of New Spain into the several independent Republics of Central America required recognition from other Powers, before it could be regarded as internationally complete, as the result of that transformation was to give birth to new independent political bodies.

Annexation of Texas.

§ 20. A Dependency may separate itself from the independent political community of which it has been a member, and may declare itself an Independent Sovereign State; and so long as the New State confines its action within the Civil Society of which it is composed, it does not require any recognition of its *Sovereignty* from other States. But if it seeks to hold International intercourse with other States, and

International recognition of Independence.

claims to be received into the fellowship of Nations upon terms of equality and reciprocity with other Nations, it must obtain from them the recognition of its *Independence* as a preliminary step. Every other State is at liberty to grant or withhold this recognition, subject to the consequences of its own conduct in this respect; as for instance, if it grants such recognition, it may incur the hostility of the State from which the new State has separated itself; if it refuses such recognition, it may incur the hostility of the new State or its allies; but until such recognition has been universal on the part of other States, the new State is entitled to the exercise of international privileges in relation to those States only which have recognised its independence [2]. This recognition may take place explicitly under the express provisions of a treaty of friendship or alliance, in which the independence of the new State is guaranteed by its ally: thus France recognised and guaranteed the independence of the United States of America by the treaty of Paris [3] (Feb. 6, 1778); and Prussia in a similar manner recognised and guaranteed the Confederation of the Rhine by the Treaty of Tilsit [4] (July 7, 1807); or by implication, upon the mutual interchange of accredited envoys, whereby either State acknowledges *de facto* the competency of the other to negotiate and contract engagements under the Law of Nations.

Treaty of Paris, Feb. 6, 1778.

§ 21. The International Life of a State is not determined by an internal Revolution, whereby the Supreme Power of the State is transferred from one portion of the body politic to another portion. A State does not enjoy any international rights by rea-

International life not determined by political changes within a State.

[2] Wheaton, Part I. c. 2. § 6. [3] Martens, Recueil, II. p. 605.
[4] Ibid. VIII. p. 641.

son of its peculiar internal organisation, and it therefore does not forfeit any such right by a modification of its internal constitution, neither can it thereby discharge itself from any of its obligations towards other Nations. Pending a Revolution, the ordinary relations of a State towards other States may be interrupted owing to the suspended action of the Supreme Power of the State, and its temporary inability to direct the will of the entire community. But the interruption of ordinary international intercourse is an abnormal state of things, which ceases immediately upon the restoration of internal order within the State, and if the Revolution fails, the *status ante* revives: if, on the other hand, the Revolution proves successful, the government *de facto* succeeds to the rights and obligations of its predecessor in all international matters, and intercourse is resumed with other nations on that understanding. There may be exceptions however to this rule with respect to certain treaty-engagements, which come under the general division[5] of *personal* as contradistinguished from *real* treaties. Of such kind was the famous treaty of alliance[6] concluded in 1761, under the name of the Family Compact, between the Very Christian King and the Catholic King, and to which the other reigning Princes of the House of Bourbon were invited to accede. The engagements of this treaty necessarily determined from the moment when the princes of the House of Bourbon ceased to reign in France.

Personal Treaties.

The Family Compact of 1761.

§ 22. On the other hand, the identity of a Republican State in respect of *real* treaties is not destroyed by its conversion into a Monarchical State; "Every alliance," writes Vattel[7], "made by a Republic is in

Real Treaties.

[5] Vattel, B. II. c. 12. § 183. Wolff, Jus Gentium, § 414.

[6] Martens, Recueil, I. p. 16.

[7] Vattel, B. II. c. 12. § 185.

its own nature *real*, for it relates only to the body of the State. When a free People, a popular State, or an aristocratical Republic concludes a treaty, it is the State itself which contracts, and her engagements do not depend on the lives of those who were only the instruments in forming them; the members of the people or of the governing body change and succeed each other, but the State still continues the same. Since, therefore, such a treaty relates directly to the body of the State, it subsists, though the form of the Republic should happen to be changed, even though it should be transferred into a Monarchy. For the State and the Nation are still the same, notwithstanding every change that may take place in the form of the government, and the treaty concluded with the Nation remains in force as long as the Nation exists. But it is manifest that all treaties relating to the *form of government* are exceptions to this rule. Thus two popular States that have treated expressly, or that evidently appear to have treated with the view of maintaining themselves in concert in their state of liberty and popular government, cease to be allies from the very moment that one of them has submitted to be governed by a single person." "Enimvero si in fœdere consensum sit, quod statui non nisi populari proprium sit, per se patet, sublato statu populari tolli etiam fœdus, ac per consequens mutata reipublicæ forma idem finiri[8]."

Sovereignty distinct from Independence.

§ 23. Grotius has been content to define a State to be a complete body of free persons, associated together to enjoy peaceably their Right, and for their common benefit[9]; and has declared the mutual relations of such bodies to be the objects of Public Law.

[8] Wolff, Jus Gentium, § 416.

[9] De Jure Belli et Pacis, L. I. c. 1. § 14.

Wolff[10] has not adopted any different view when he defined a nation as "multitudo hominum in civitatem consociatorum." Vattel, on the other hand, has defined States or Nations as "societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength[11];" but he has subsequently endeavoured to attain to greater precision, when he says, that "every Nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign State.* Its rights are naturally the same as those of any other State. Such are the moral persons who live together in a natural society, subject to the Law of Nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really *sovereign* and *independent;* that is, that it govern itself by its own authority and laws[12]." Vattel, however, has gone too far in combining Sovereignty with Independence as the *criteria* of Nationality; for Sovereign States are not necessarily Nations, while States internationally independent are not always Sovereign Powers. Thus the States of North America which compose the Federal Union are all Sovereign States[13], but the nationality of each State is merged in the nationality of the Union. Under the Federal Compact, the members of the Union have precluded themselves from entering severally into treaty-engagements with Foreign Powers, and they can only enter into such engagements jointly as an Union of States, the treaty-making power being under the constitution of the

The United States of America Sovereign States.

[10] Wolff, Jus Gentium, Prolegomena, § 2.

[11] Préliminaires, § 9.

[12] Droit des Gens, L. I. c. 1. § 4.

[13] Cranch's American Reports, IV. p. 212. McIlvaine v. Coxe's Lessee.

Union vested in the Federal Government. The States have accordingly ceased to be severally Independent Bodies Politic, and their respective rights and obligations are not the subjects of international law, but are regulated by the constitutional law of the Union. The relations of the Union, on the other hand, towards the several component States are similarly determined by the Federal Compact, whilst the relations of the Union itself towards Foreign States are regulated by a law independent of the Federal Compact; to wit, the Law of Nations. On the other hand, there may be States, which maintain independent relations with other nations, but have not full rights of sovereignty. Thus the States of the Roman Empire of the Germans enjoyed, subsequently to the peace of Westphalia, the right to form offensive and defensive alliances amongst themselves and with Foreign Powers, yet no alteration took place in their feudatory relation to the Chief of the Empire, as their Supreme Lord or Suzerain, until 1806, when the Emperor Francis II declared the Germanic Empire to be dissolved, and released the Electors, Princes, and States from their allegiance to him as Chief of the Empire. They thereupon became for the first time Sovereign Powers. So the Barbary States, whilst they were tributaries of the Ottoman Porte, and subject to the Suzerainty of the Sultan of Constantinople, exercised the right of entering into treaty-engagements, as Independent Powers, with the Christian Nations of Europe.

The States of the Roman Empire of the Germans Independent, but not Sovereign States.

§ 24. Some of the more recent writers on the Law of Nations, such as Martens[14], Klüber[15], and Heffter[16],

Semi-Sovereign States a solecism.

[14] Précis du Droit des Gens, § 20.

[15] Droit des Gens, § 24.

[16] Heffter, Das Europäische Völkerrecht, § 19.

have applied the distinctive epithet of *Semi-Sovereign* to such States as are recognised as Independent States under the Public Law of Europe, but have not complete rights of Sovereignty. The term *Semi-Sovereign* seems to have been introduced by John Jacob Moser, in his "Essays on the Law of Nations in time of Peace[17]." Heffter, although he recognises the classification, considers it to be objectionable; and Wheaton has observed that "the denomination of *Semi-Sovereign States* is an apparent solecism in terms. As no State," he says, "can be considered at once sovereign and subject, so no State can with strict propriety be considered as half or imperfectly supreme. But as some States are by special compact dependent upon other States with respect to the exercise of certain rights essential to perfect sovereignty, such States have been termed Semi-Sovereign States."

Conventional Independence of States.

§ 25. It is not desirable that this classification of certain States as Semi-Sovereign States should find a place in a system of law which is concerned only with the external relations which States bear to one another as *independent* political communities[18]. The term itself, "Semi-Sovereign," points at once to another system of political law, and suggests rather a subordination of position analogous to that in which the Princes and States of the Germanic Empire stood in former days relatively to the Emperor as their Suzerain or Supreme Lord, than a modification of the manner in which the foreign relations of an *independent* State, as such, are maintained. The international rights of the States, which rank in this

[17] Beyträge zum Völkerrecht in Friedenzeiten, I. p. 508, cited by Gunther I. p. 120.

[18] Neyron in his Principes du Droit des Gens Européens (Brunswic, 1763), adopts the division of States of the First Order and States of Second Order, meaning by the latter term States under a feudal Suzerain.

category, are in *substance* as complete as those of any other independent State, and it is only in the *mode* in which those rights are exercised that a distinction is found to exist. Independent States in their normal condition communicate immediately with one another; but there are exceptional instances in which the communications of an Independent State with Foreign Powers are carried on through the medium of a third Power, which has been acknowledged by public treaties as the authorised organ of such communications. In certain of these cases the Intermediate Power has been recognised by Foreign States as exercising a *protection* (patrocinium) over the weaker State, and has been acknowledged in terms as the Protecting Power. The designation of *Protected States*[19] would accordingly seem *prima facie* to be appropriate to these States in a system of international law, as being suggestive of their essential peculiarity; but as there are many protected States, which in accepting that character have abdicated altogether their independence, and do not maintain independent political relations under any modification with Foreign Powers, the designation of "*Protected States*" would be not sufficiently precise, and it would be necessary, in order to avoid confusion, to distinguish them further as *Protected Independent States.* But a definition less open to objection is suggested by the consideration that the independence which this class of States enjoys is regulated in its mode of exercise by Public Conventions. Their independence therefore may fitly be characterised as a *Conventional Independence,* in

Protected States.

[19] Grotius, L. I. c. 3. s. 21. § 3, recognises States which by treaty are 'sub patrocinio, non sub ditione,' and Bynkershöek, Quæst. Jur. Publici, L. I. c. 9, speaks of States 'qui sub tuitione sunt.'

contradistinction to the *absolute Independence* which the more powerful States acknowledging no political Superior enjoy under the common Law of Nations.

Independent States protected under Public Treaties.

§ 26. The origin of these *Protected* Independent States is to be referred either to special treaty-engagements between two States, under which the stronger Power has granted its protection to the weaker States, and their treaty-engagements have been formally recognised by the European Powers; or to some general treaty amongst the European Powers, under which the Protecting Power has undertaken to protect the weaker State, and the other Powers have engaged themselves to hold political intercourse with the weaker State only through the medium of the Protecting Power. In the case of Protected States, which are not members of the Family of Nations, the relations between them and the Protecting Power are for the most part founded upon some compact [20] between them, but as the protected State does not maintain any relations whatever with Foreign Powers, it is virtually a dependency of the Protecting Power, being distinguished from ordinary dependencies in this respect, that its rights are secured and its obligations limited by compact. It is a dependency *sub modo*, as distinguished from an absolute dependency.

Native States of India.

The Native States of India are instances of Protected Dependent States, maintaining the most varied relations with the British Government under compacts with the East India Company. All these States acknowledge the supremacy of the British Government, and some of them admit its right to interfere in their internal affairs, inasmuch as the

[20] In the nature of an unequal alliance *cum diminutione imperii*. Grotius, L. II. c. 15. s. vii. § 2.

East India Company had become virtually sovereign over them. None of these States, however, hold any political intercourse with one another or with Foreign Powers [21].

Principality of Monaco.

§ 27. The Principality of Monaco is a remarkable instance in Europe of a Protected Independent State; the relations of which towards the Protecting Power have been settled by special treaty-engagements between itself and the Protecting Power, which have been subsequently recognised by the European Powers. Monaco was erected into a Principality as far back as the tenth century (A. D. 968) by the Emperor Otho I, in favour of the Grimaldi family, who were Lords of Antibes in France, and it is held in the present day by a descendant of the original grantee through the female line. In the seventeenth century the Prince of Monaco, in order to disembarrass his Capital of a Spanish garrison, which had usurped possession of it at a period when the Duchy of Milan was still an appanage of the Spanish Crown, entered into a treaty with Louis XIII. of France (Convention of Peronne, 14 Sept. 1641) [22], whereby he placed himself under the protection of the King of France, who undertook thenceforth to maintain at his own charge a garrison of five hundred French soldiers in Monaco. This Treaty continued in force and operation down to 1792, when the National Convention of France incorporated the Principality of Monaco, including the three communes of Monaco, Mentone, and Roccabruna, into the French Republic,

Convention of Peronne, 14th Sept. 1641.

[21] An account of six classes of Protected States in India is given in "Sketches of the Relations subsisting between the British Government of India and the different Native States," by Captain J. Sutherland. Calcutta, 1833. British and Foreign Review (1839), vol. viii. p. 154.

[22] Schmauss, Corpus Jur. Gentium Academicum, I. p. 521.

and constituted it within the Department of the Maritime Alps. By the subsequent Treaty of Paris[23] (30 May, 1814), concluded between France on the one part and Austria and her allies on the other, France renounced possession of Monaco, and the ancient relations between the Prince of Monaco and the King of France, such as they existed before 1 Jan. 1789, were recognised to be once more in force. By the subsequent Treaty of Paris[24], (20 Nov. 1815,) concluded between the four Allied Powers severally on the one part, and France on the other, it was declared that the relations re-established by the Treaty of 30 May, 1814, between France and the Principality of Monaco, should be at an end, and that analogous relations should thenceforth exist between that Principality and the King of Sardinia. Those relations were subsequently defined by the Treaty of Turin[25], (Nov. 7, 1817,) concluded between the King of Sardinia and the Prince of Monaco, almost literally in the words of the Convention of Peronne (*mutatis mutandis*). Thus the King of Sardinia was to maintain a garrison at his own expense in Monaco, which was to be under the command of the Prince of Monaco, as Governor for his Majesty, and the King was not to interfere with the Prince's rights of Sovereignty in other respects. The King of Sardinia undertook to defend the Prince of Monaco against foreign enemies, to include his name in all treaties of peace, and to allow him to use the Royal Standard of Sardinia in time of war. The Principality meanwhile had its own commercial flag, and Consuls were accredited by the King of Sardinia

Treaty of Paris, 20 Nov. 1815.

Treaty of Turin, 7 Nov. 1817.

[23] Martens, N. R. II. p. 5.
[24] Martens, N. R. II. p. 687.
[25] Articles de Protection, Martens, Nouveau Supplément, II. p. 343.

to reside at Monaco in order to watch over the commercial interests of Sardinian subjects in that port, precisely as in the ports of other Independent States. The integrity of the Principality was subsequently affected by the annexation of Mentone and Roccabruna to Piedmont in 1848, when the inhabitants of those districts, dissatisfied with the administration of the reigning Prince, voted their annexation to Piedmont. The annexation of these districts was accepted by the Sardinian Parliament and sanctioned by the King of Sardinia, whilst the Prince of Monaco recorded a protest [26] against the wrongful act of the Protecting Power.

Cession of Mentone and Roccabruna to France.

§ 28. The Seignory or Lordship of Kniphausen stood in a more anomalous relation to the Grand Duke of Oldenburg. The State of Kniphausen had originally been a *sub-feudum* of the Holy Roman Empire, held *mediately* by its Lord through the Feudal Court of Brussels. After the Emperor of the Romans had by the Treaty of Campo Formio [27], (17 Oct. 1797,) renounced possession of the Belgian Provinces, known as the Austrian Low Countries, in favour of the French Republic ; and after this renunciation on the part of the Emperor had been further recorded with greater formality in the Treaty of Luneville, (9 Feb. 1801 [28],) Kniphausen was constituted an

The Lordship of Kniphausen.

[26] These districts, as forming part of the arrondissement (circondario) of Nice have since been ceded by the King of Sardinia to the Emperor of the French, under the Treaty of Turin (24 March, 1860), whilst the remainder of the Principality of Monaco still continues to be an Independent State under the Government of the Hereditary Prince Charles III. By a subsequent Treaty concluded at Paris (Feb. 2, 1861) between the Prince of Monaco and the Emperor of the French, the Prince renounced in perpetuity all his right to the Communes of Mentone and Roccabruna.

[27] Martens, Recueil, VI. p. 421.

[28] Ibid. VII. p. 296.

immediate fief of the German Empire by the Decree of the Deputation of the Empire on 25th Feb. 1803. Upon the subsequent dissolution of the Roman Empire of the Germans in 1806, which was a necessary consequence of the Treaty of Presburg, (26 Dec. 1805,) concluded between the Emperor Francis and the Emperor Napoleon I., and which paved the way for the Confederation of the States of the Rhine, (Paris, 12 July, 1806,) the Lord of Kniphausen became an independent Sovereign Power. His independence however was of short duration. The Emperor Napoleon I. occupied the territory of Kniphausen, and subsequently transferred it under the Treaty of Tilsit to the Emperor of Russia, who ceded it to the Duke of Oldenburg. Upon the restoration of peace in 1815, when the Sovereign Princes and Free Cities of Germany, feudatories in former days of the Germanic Empire, united themselves together on a footing of equality as members of the Germanic Confederation, the Lord of Kniphausen was not admitted into the Confederation, in deference to the objections of the Emperor Alexander of Russia. Negotiations however on the subject of Kniphausen were originated at the Congress of Aix-la-Chapelle in 1818, and led to the conclusion of the Treaty of Berlin [29], (8 June, 1825,) between Count Bentinck of Kniphausen, and Duke Peter of Oldenburg, under the mediation of Russia, Prussia, and Austria. Under this Treaty the Count agreed that the Duke of Oldenburg should exercise over him and his family, as territorial Lords of Kniphausen, a supremacy analogous to that which had appertained to the Emperor of Germany before the dissolution of the Empire. The Seignory of Kniphausen, by virtue of this *conventional* subordination

Treaty of Tilsit.

Treaty of Berlin, 8 June, 1825.

[29] Meyer, Staats-Acten des Deutschen Bundes, II. p. 289.

of its Lord to a member of the Germanic Confederation, became appurtenant to the lands of the Confederation; and the Treaty itself was guaranteed by the Germanic Confederation in its character of an European Power (9 June, 1829). The result of these treaty-engagements was twofold. Under the Treaty of Berlin the Duke of Oldenburg was bound to discharge towards the Counts of Kniphausen duties of Protection analogous to those which the Emperor of Germany had discharged, whilst the Empire existed, towards his feudatories; whilst the Germanic Confederation was bound under the Federal Act to defend the territory of Kniphausen against foreign aggression, by virtue of its recognised subordination to a member of the Confederation. The State of Kniphausen meanwhile retained its own *commercial* flag, but the Duke of Oldenburg, under the ninth article of the Treaty of Berlin (8 June, 1825), was constituted the *political* representative of the Lord and his subjects in their relations with Foreign Powers. Augustus, the son and successor of Duke Peter of Oldenburg, assumed the title of Grand Duke on 22nd May, 1829. Having meanwhile acquired possession of the lands of the Counts of Kniphausen, which possession, however, as a matter of right was contested by the Counts Bentinck, he ceded to Prussia by a Convention, signed at Berlin on 20th July, 1853, the Sovereignty over the Bay of the Jahde, together with a border of territory on either side of the Bay, sufficient to form a naval establishment thereon, and the said territory has been subsequently united to Prussia by Letters Patent of the King of Prussia bearing date 5 November, 1857. This Cession of the Bay and the adjoining territory was made, as expressly stated in the Convention, to enable Prussia to form a harbour

for ships of war, and the Jahde has now become the most important military harbour of the German Empire on the coast of the North Sea. By Article 53 of the German Constitution the harbour of Kiel in Holstein and the harbour of the Jahde are declared to be Imperial military harbours. It deserves remark that the embouchure of the Jahde was the port of correspondence between England and her German allies during the Napoleonic wars, when the ordinary channels of communication by the Weser and the Elbe were closed against England either by the police of Napoleon I. or by the frost of winter. The depth of water in the Bay of Jahde is so great that it is rarely, if ever, frozen over. The only drawback to it, as a military port, is that there is a *teredo* in its waters very fatal to wooden ships, of a like kind to that which is the pest of the harbour of Sebastopol in the Crimea.

The United States of the Ionian Islands.

§ 29. The United States of the Ionian Islands were, on the other hand, an instance of an Independent State placed by the provisions of a general treaty under the immediate and exclusive Protection of another Independent Power. The Seven Islands had formed a portion of the maritime possessions of the Republic of Venice antecedent to 1797, when they passed under the sovereignty of the French Republic. They were subsequently occupied by the joint forces of Russia and the Ottoman Porte, and were constituted under the treaty of Constantinople[30], (21 March, 1800,) concluded between those two Powers, tributaries of the Sultan, as their Suzerain and Protector, in like manner as the Republic of Ragusa had been an Independent State under the protection of the Sultan since the 14th century. The Seven Islands were subsequently recognised as an Independent

Treaty of Constantinople, 21 March, 1800.

[30] Martens, Recueil, VII. 41.

Treaty of Amiens. Treaty of Tilsit.

Republic in 1802, under the Treaty of Amiens[31]. Under the secret articles of the Treaty of Tilsit, the Emperor of Russia, in contempt of his guaranty towards the Ottoman Porte, transferred the Seven Islands in full sovereignty to France. During the subsequent course of the war Great Britain acquired possession of six of the Islands, but Corfu remained in the hands of the French down to 1814, when it was ceded under the Treaty of Paris to the Four Allied Powers, and was consequently reserved for their joint disposal, in conformity with the provisions of the Treaty of Pilnitz, as an acquisition made by them in common during the war. Although, therefore, the six smaller Islands were by right of conquest at the absolute disposal of Great Britain, Corfu could only be disposed of with the common consent of the Four Allied Powers. Great Britain, as it appears from Lord Castlereagh's Memoirs[32], had contemplated in 1814 that a direct Sovereignty over these Islands should be given to some acknowledged European Power, and preferred either the King of Sicily or the Emperor of Austria. On the other hand, Count Capo d' Istrias, a native of Corfu, who was in the intimate councils of the Emperor Alexander, suggested to that Sovereign that the Islands should be recognised as an Independent State, and be placed under the protection of Great Britain. The Emperor Francis repudiated altogether the notion of a strictly continental Power like Austria embarrassing itself with the charge of insular possessions. Great Britain on the other hand was extremely reluctant to accept the position of a Protecting Power[33], and at first withdrew the Six

[31] Martens, N. R. III. p. 13.

[32] Letter of Lord Castlereagh to Lord Liverpool, vol. x. p. 224.

[33] Lord Bathurst to Lord Castlereagh, vol. x. p. 441.

Islands, over which she had an absolute right of disposal, from the proposed common arrangement. Great Britain at last consented to accept the charge of Protector of all the Seven Islands at the urgent instance of the Emperor Alexander, who stated in Conference with the other Powers, that he had pledged himself that the Islands should neither be incorporated into any other State, nor become the vassals of any Suzerain, but should enjoy a constitution which would secure their material independence; and as Great Britain could alone satisfy what he considered to be a right of the Ionians, it was the duty of Great Britain to accept the government of the Seven Islands. The result was embodied in three separate Conventions of identical tenor, executed at Paris[34], (5 Nov. 1815,) between Great Britain and her three allies, Russia, Austria, and Prussia respectively, under which the Seven Islands were declared to form a Single Free and Independent State under the immediate and exclusive protection of the King of Great Britain and Ireland. The trading flag of the United States of the Ionian Islands was acknowledged by the contracting parties as the flag of a Free and Independent State, and none but commercial agents or consuls, subject to the regulations, to which commercial agents or consuls are subject in other Independent States, were to be accredited to the United Ionian States. All the Powers which signed the Treaty of Paris, (30 May, 1814,) and the Act of the Congress of Vienna, (9 June, 1815,) and also the King of the Two Sicilies and the Ottoman Porte,

Convention of Paris, 5 Nov. 1861.

[34] The Austrian Treaty is in Martens, N. R. II. p. 663, and in the British and Foreign State Papers, 1815, 1816. The Russian Treaty is in the Annual Register for 1815. The Prussian Treaty is in the Collection of Treaties, (Preussen's Staatsverträge,) published in Berlin, 1852, p. 784.

were to be invited to accede to the Conventions. The King of the Two Sicilies recognised the Protectorate of the King of Great Britain by the Convention of London[35], (26 Sept. 1816,) and the Ottoman Porte by a Special Act[36], (24 April, 1819,) renounced its sovereignty over the Seven Islands and their dependencies in favour of the King of Great Britain, as the Sovereign Protector of the Islands.

Neutrality of a Protected Independent State.

§ 30. The history of the Ionian Islands during the war of 1854–56 between Russia and the Ottoman Porte is illustrative of the practical inconvenience of adopting the epithet "Semi-Sovereign," as representing the International Status of a *Conventional Independent* State. The connection between the Seven Islands and the United Kingdom of Great Britain and Ireland was purely *personal*. The King of Great Britain and Ireland exercised authority over the Ionian States not *Jure Coronæ*, but simply *ex Pacto;* and the Ionian People were *Ionian subjects*, not subjects of the *British Crown*. The Ionian States accordingly did not necessarily follow the fortunes of the Crown of Great Britain and Ireland in war and in peace; they might remain neutral, like other independent States, whilst the Protecting Power was engaged in hostilities with other Powers, and they did not participate in the advantages of any treaty-engagements entered into by the King of Great Britain and Ireland, unless he had stipulated specially in behalf of Ionian subjects in his character of the Protecting Power of the United Ionian States. At the commencement of the war with Russia, in which France and Great Britain took part, as the allies of the Porte, the Executive Government of Great Britain, under a misapprehension that the

[35] Martens, Traités, N. R. V. p. 116. [36] Ibid. p. 387.

Protecting Power of a so-called Semi-Sovereign State had certain paramount rights of Sovereignty over it, refused to recognise the neutrality of Ionian subjects, and a decision of a British Court of the Law of Nations[37] was invoked on behalf of Ionian subjects to clear away the misapprehension. The classification of this order of States under the head of *Conventional Independent States*, as already suggested, is calculated to prevent misapprehensions of a like nature in other cases by directing attention at once to their special character. Upon the election of Prince George of Denmark to the throne of Greece, Great Britain renounced her Protectorate over the Seven Islands and their dependencies by a Treaty signed at London on 14 November, 1863, to which France was a party in addition to the Three Powers which, with Great Britain, were co-signatories of the Treaty of Paris of Nov. 15, 1815. It was further provided by this treaty that the Seven Islands upon their union with the Kingdom of Greece should enjoy the advantages of a perpetual neutrality, which the High Contracting parties engaged themselves to respect. The Union of the Islands to the Kingdom of Greece was subsequently effected with the mutual consent of the Parliament of the Ionian Islands and of the Parliament of the Kingdom of Greece.

The Free City of Cracow.

§ 31. Much confusion of thought has arisen from a similar cause respecting the International Status of the City of Cracow and its territory. On the dissolution of the ancient kingdom of Poland, the City of Cracow and the territory assigned to it was under the Convention of St. Petersburg[38] (13 Oct. 1795) evacuated by the Prussian Armies, and united to the

Convention of St. Petersburg,

[37] The Leucade. Admiralty Prize Cases, 1854–56, p. 217.

[38] Martens, Traités, R. VI. p. 171.

24 Oct. 1795. Treaty of Vienna, 14 Oct. 1809.

Austrian Monarchy, from which it was again severed by Napoleon I, and by the subsequent Treaty of Vienna [39] (14 Oct. 1809) it was attached to the Duchy of Warsaw, then belonging to the King of Saxony. This latter Duchy, being a new State created by the Emperor Napoleon I, was in fact a fourth division of the ancient Kingdom of Poland in favour of a fourth occupant. The issue of the campaign of 1812 placed the Emperor Alexander in possession of the various portions of territory, which had served by their union to make up the Duchy of Warsaw, and which were subsequently redistributed between Russia, Austria, and Prussia, under two separate treaties,

Treaties of Vienna, 3 May, 1815.

concluded between Russia and the two other Powers respectively at Vienna (3 May, 1815 [40]). An additional treaty [41] of the same date, concluded between the three Powers, provided that the City of Cracow with its territory should be regarded (*sera envisagée*) for ever, as a free, independent, and strictly neutral city, under the protection of the three High Contracting Powers. The Three Courts under the sixth article engaged themselves to respect, and cause to be respected on all occasions, the neutrality of the Free City of Cracow and its territory. An armed force was not to be introduced into it upon any pretext whatever at any time. In return, it was understood, and expressly stipulated, that there should not be granted within the Free City or upon the territory of Cracow any asylum or protection to fugitives from justice, or to deserters from the dominions of any of the Three Contracting Powers, but that such persons should be immediately surrendered upon a demand of extradition made by the competent authorities. It was

[39] Martens, Traités, N. R. I. p. 211.

[40] Ibid. N. R. II. p. 225.

[41] Ibid. p. 251.

further provided, that the City of Cracow should not have the right of levying custom duties, but only pontage and road tolls upon the transit of goods and cattle, according to a tariff regulated by the Commissioners of the Three Powers. The other Articles of the Treaty regulated the political constitution of the Free City, and settled various matters of civil and ecclesiastical administration. A further Treaty between the Three Allied Powers of the same date completed their mutual engagements in relation to the Duchy of Warsaw and the various territories which had made up the ancient Kingdom of Poland, as it existed in 1772. Under this Treaty, each of the Contracting Parties was to be at liberty to establish Consuls or Commercial Agents in respect to the Duchy of Warsaw, subject to the usual recognition under the Constitution as approved by the Three Powers; but no similar provision is found in the Treaty relative to Cracow, and the omission of all provision in regard to Consuls or Commercial Agents is an important peculiarity in that Treaty.

Its Internal Constitution a subject of Treaty.

§ 32. The Internal Government of the Free City of Cracow and its territory was to reside in a Senate consisting of Twelve Senators and a President. The Legislative Power was committed to the Senate and an Assembly of Representatives, the latter body having the right of controlling the administration by examining the accounts, voting the budget, and impeaching the public functionaries, if suspected of peculation. The Peace of the City and the Police of the Roads was to be maintained by a civic militia. This Constitution was annexed to the Treaty, which placed it formally under the common guaranty of the Three Contracting Powers. It has been a matter of subsequent diplomatic discussion, upon what principle

the European Powers, which took part in the Congress of Vienna, acted in admitting this Treaty between the Three Powers to be inserted in the text of the Principal Act of the Congress. A slight modification was made in the language of the Article respecting the City of Cracow and its territory as inserted in the Principal Act, namely, the City of Cracow is declared (*est déclarée* instead of *sera envisagée*) to be for ever a free and independent and strictly neutral City under the protection of Russia, Austria, and Prussia. With this exception, the language of the Article in the Triple Treaty and in the Act of the Congress is identical. It is known that the introduction of the provisions of the Triple Treaty into the General Act of the Congress was objected to by Austria, as devoid of political meaning, and as inconsistent with the intention of the Protectorate, and that the Emperor Francis reluctantly admitted its insertion in deference to the reiterated instances of the Emperor Alexander. It was subsequently maintained on behalf of the Three Courts[42], when their common intention to suppress the independent existence of Cracow was announced to France and Great Britain in 1846, "that they had merely presented to the Congress of Vienna, for registration in the General Instrument termed the Principal Act of the Congress, the Convention which they had concluded with one another, and that the other Powers, who signed the Principal Act of the Congress, or the General Treaty, did no more than receive that combination, as the result of the direct negociations between the Three Courts, without interfering in that territorial arrangement to which they

Principal Act of the Congress of Vienna.

View of the Three Courts as to the Suppression of Cracow in 1846.

[42] Despatch of Prince Metternich to Count Dietrichstein, 6 Nov. 1846. Martens, N. R. Gen. T. X. p. 55.

were strangers." France [43], however, in reply, denied that the Independent Powers, who signed the Principal Act, merely registered the decisions and acts of the Three Powers who were Parties to the Triple Treaty, and contended that the foundation of the Republic of Cracow was placed in the same rank with the stipulations which formed other States, established Kingdoms, recognised the Free Cities of Germany, created the Germanic Confederation; and that the virtual insertion of the Triple Treaty textually in the General Act was intended to give to the existence of the Republic of Cracow much stronger and more authentic guaranties; and accordingly that all the Powers, which were Parties to the Treaty of Vienna, had an incontestable right to take part in the deliberations and decisions, of which the Republic of Cracow might be the object. Great Britain [44], to the same effect, asserted, that, with whomsoever might have originated the plan of erecting Cracow and its territory into a Free and Independent State, that plan was carried into effect by stipulations, to which all the Powers were equally parties, and consequently it was not competent for three of those Powers by their own separate authority to undo that, which was established by the common engagements of the whole. The Three Powers, on the other hand, conceived themselves at liberty to modify or annul the Triple Treaty, and to stipulate other conditions by free and reciprocal agreement. They accordingly agreed, that, as the Protected State had violated the obligation of neutrality imposed upon it as a condition of its exist-

French view.

British view.

[43] Note of M. Guizot addressed to Count Flahaut in reply to the Despatch of Prince Metternich, 4 Dec. 1846. Martens, N. R. Gen. T. X. p. 118.

[44] Despatch of Lord Palmerston to Lord Ponsonby, 23 Nov. 1846. Martens, N. R. Gen. T. X. p. 110.

ence under the Triple Treaty, they were not merely at liberty, but were bound in self-defence to declare the Triple Treaty to be at an end; and as the Protected State had destroyed by its own act the work which the Protecting Powers had founded, they were not bound to re-establish it, but might allow the state of Possession anterior to 1809 to revive. The Two Western Powers, on the contrary, protested formally against the suppression of the Republic of Cracow, as at variance with the letter as well as with the spirit of the General Treaty of Vienna, and as in their opinion not warranted by any adequate necessity.

Cracow and the Ionian Islands.

§ 33. It is not easy to understand in what peculiar circumstances certain distinguished publicists[45] have discovered so wide a distinction between the Free and Independent City of Cracow, under the joint Protectorate of the Three Powers, and the Free and Independent State of the United Ionian Islands under the sole and exclusive Protection of Great Britain, as to declare that the former was to be regarded as a completely Sovereign State, whilst the latter had undergone a material abridgement both in its Internal and External Sovereignty. As far as External Sovereignty was concerned, no European Power could place itself in connection with the State of Cracow, politically represented as it was under the General Treaty of Vienna by the Three Powers, except through the medium of one of the Three Courts: in a similar manner, it was only through one of the Three Courts that the State of Cracow could address itself to Foreign Governments; and the triple Protectorate was as exclusive in the case of Cracow, as the single Protectorate in the case of the Ionian Islands. If a careful comparison is instituted

[45] Martens, L. I. c. 11. § 20. Wheaton's Elements, Part I. c. 11. § 13.

between the condition of the United Ionian Islands, and the condition of the Free City of Cracow, it will be seen that the Ionian Islands enjoyed far more of the rights which pertain to an Independent State, than the Free City of Cracow. The latter State was by the Triple Treaty declared not to have the power to levy any custom duties; whereas the Ionian Parliament had full power to impose custom duties upon imports and exports, as well as to levy other taxes. Cracow had neither a commercial flag by treaty nor commercial agents in foreign countries, whilst the Ionian Nation had both; and the Lord High Commissioner, although he was nominated by the Protecting Power, did not exercise his authority according to the behests of the Protecting Power, but according to the Constitutional law of the Ionian States, being in fact not a British, but an Ionian authority.

The extinct Republic of Poglizza.

§ 34. The Republic of Poglizza, in Dalmatia, has been cited by Martens[46], and on his authority by Wheaton, as an existing instance of a Semi-Sovereign State under the protection of Austria. Poglizza, however, ceased to exist as an Independent State in 1807, on the occupation of Dalmatia by the French armies. The origin of this Republic, the name of which signified "a small field," dated from a period antecedent to the Ottoman invasion of Europe. It consisted of twelve towns or villages, with a population of about 4000 souls, and a territory of about forty Italian miles in circumference, the capital of which was Gatta, where the Velisbor, or Great Council, was held. Their first rights were granted to them by the Kings of Hungary, and the same were subsequently confirmed to them by the Republic of St.

[46] Précis du Droit des Gens, LI. c. 2. § 10.

Mark, to which they became tributary and furnished mercenary troops, obtaining from the Venetians certain advantages in return. Upon the suppression of the Venetian State by the Emperor Napoleon I, Poglizza passed under the Protection of Austria, and continued in the enjoyment of its Independence, until it was destroyed amidst the conflicts between the Russian forces under Siniavin and the French armies under Marmont[47].

The Republic of Andorre.

§ 35. Andorre is a small Republic, situated between the Pyrenees of Arriège in France and the Pyrenees of Catalonia in Spain. It has been classed by some writers amongst *neutral* Independent States, but its proper place is amongst *protected* Independent States. Its independence dates from the reign of the Emperor Louis le Débonnaire, who by a Charter issued in the year 801, and still preserved in the Archives of the Republic, constituted the People of Andorre an Independent State, with liberty to elect a Count as their Protector. They accordingly chose for their Protectors the neighbouring Counts of Foix. The Emperor Charlemagne had, prior to the Charter of his son Louis le Débonnaire, granted the tithes of the six parishes, which make up the Republic of Andorre, to the See of Urgel in Catalonia, but he had granted at the same time to their inhabitants a distinct military organization. His grandson, Charles the Bald, disregarding the Charter of Louis le Débonnaire, issued, in the year 860, a Diploma, whereby the Sovereignty over Andorre was assigned to the Bishops of Urgel. This wrongful act gave rise to a war between the Bishops of Urgel and the State of Andorre, which lasted for a period of four hundred years, and in

[47] Mémoires du Maréchal Duc de Raguse, III. p. 49. Sir Gardiner Wilkinson's Dalmatia and Montenegro, II. p. 195.

which the Counts of Foix took part as Protectors of the Republic. Hostilities were at length brought to a close by a Treaty, under which the Bishops of Urgel and the Counts of Foix were recognised as joint Suzerains over Andorre. This joint Suzerainty, however, had in course of time become converted into a joint Protectorate, and the Protectorate exercised by the Counts of Foix had devolved to the French branch of the House of Bourbon[48]. On the abdication, however, of King Charles X, the last King of France, it was exercised by his successor, Louis Philippe, as King of the French. Since the abdication of the latter Monarch it has been exercised by Napoleon III as Emperor of the French, and subsequently by the President of the French Republic. The Chief of the French State and the Spanish Bishop of Urgel would thus appear to be joint Protectors of the Republic of Andorre under the title of *Co-Principes*. The Val d'Andorre forms part of the frontier between Spain and France. In the civil war, during which Don Carlos disputed the new order of succession to the Crown of Spain, which had been established by King Ferdinand VII in favour of his daughter, who succeeded to him under the title of Queen Isabella II, Andorre claimed to be independent and neutral, and concluded a convention of neutrality with the Queen's Government (22 December, 1834[49]). Its territory is about thirty miles in length and twenty miles in breadth, divided into six parishes, and the Republic is governed by a Domestic Executive, which is annually elected by a General Council consisting of twenty-four Consuls

[48] The family of the Counts of Foix became absorbed into the House of Bearn, and the House of Bearn in its turn was absorbed into the House of Bourbon.

[49] British and Foreign State Papers, vol. xxx. p. 1217.

or Delegates elected by the six parishes. The two Syndics or Presidents are the representatives of the Republic in all external matters [50]. The population is estimated at between eight and ten thousand, and an armed force of full fifteen hundred men is always ready to defend the independence of the Country.

The Republic of San Marino.

§ 36. San Marino was an instance of an Independent Republic under the Protection of the Holy See, and surrounded, until very recent times, by the dominions of the Protecting Power. Tradition refers its origin to the fifth century. The extent of its territory and the number of its population are nearly equal to those of the Republic of Andorre, but it has not a like military organization, the armed force of the State consisting of only about eighty men. Its independence was for a short time in the last century suspended by Cardinal Alberoni, but it subsequently recovered its ancient liberties, and the Emperor Napoleon I. formally recognised its Independence, when he entered the Papal Dominions in 1797. It is governed by a Domestic Executive, consisting of two *Capitani Regenti*, who are elected for six months by an Executive Council of Twelve, the members of which are themselves popularly elected. Since the States of the Church have become an integral portion of the Kingdom of Italy, San Marino has passed under the protection of the King of Italy, and by a Convention signed at Turin on 22 March, 1862, its ancient liberty and independence have been recognised by the Protecting Power. This International Atom may fitly close the series of *protected Independent States* [51].

[50] Historia de la Republica d' Andorra. Barcelona, 1848. The Edinburgh Review, No. 230.

[51] This State is styled by Italian writers, La Republichetta. Gunther, Europäisches Völkerrecht, Tom. I. c. 1. § 19.

CHAPTER III.

NATIONAL STATE-SYSTEMS OF CHRISTENDOM.

Single or United States—Personal Union of Independent States—Real Union of Independent States—Federal Union of Norway and Sweden—Diversity of Federal Unions—The United States of America—The Constitution of 1787—The Articles of Confederation of 1778—The Argentine Confederation—A Single State decentralized—The Constitution of the Argentine State—The Argentine Provinces—The Swiss Confederation of 1648—The Helvetic Confederation of 1815—The League of Sarnen of 1832—The Swiss Confederation of 1874—Analogy between the Swiss Confederation and certain Federal Unions—Origin of the Germanic Confederation—Federal Act of 1815—Final Act of 1820—The Ordinary Assembly of the Diet—The Plenum or Full Chapter of the Diet—Permanent Character of the Germanic Confederation—Constitution of the German Empire of 1871.

Single or United States.

§ 37. A NATION may be either a single Independent State, or an Independent System of States[1] united together by a federal compact, the conditions of which are susceptible of infinite variations. Thus a System of States may be *federally* united under an hereditary prince, or under an elective President, or under a representative Council, and in each of these cases the National Unity of the System may be as complete as in the case of a single Independent State. It is of importance, however, not to confound a Political Body of States, incorporated together *Jure Imperii* under a common Sovereign Prince, with a Federal System of States[2] united together *Jure Societatis*, which has

[1] Puffendorf, L. VII. c. 5. § 12.

[2] Sic etiam accidere potest, ut plures civitates arctissimo inter se fœdere colligentur et faciant σύστημα quoddam, ut Strabo non uno loco loquitur, neque tamen singulæ desinant statum perfectæ Civitatis retinere. Grotius, L. I. c. 3. § 7.

been, as such, the subject of International recognition. The internal constitution of a Political Body of States is altogether ignored by the Law of Nations, whereas the internal organization of a Federal System of States is the result of an International Compact; and whilst the external relations of the former Body towards Foreign Nations are of a normal kind, and are governed by the Common Law of Nations, the external relations of the latter System are of an exceptional character, and are the creatures altogether of Conventional Law.

Personal Union of Independent States.

§ 38. Two or more *Independent* States may be connected together by the link of a common Sovereign Prince under the Civil Law of the respective States. Such a connection has no International significance, inasmuch as each State retains its separate National Character. Where such a connection is of an accidental and temporary character, it has been termed by publicists a *Personal* Union; where it is of a necessary and permanent character, it has been designated a *Real* Union. This classification, however, is open to objection, seeing that in both cases the *person* of the Sovereign is the only link which connects the States; and as there is nothing in the nature of these Unions which implies Reality in an International sense, it would seem preferable to define such Unions in all cases as Personal Unions, and to distinguish them, according to their essential difference, into *temporary* and *permanent* Unions[3]. Thus the connection of the United Kingdom of Great Britain and Ireland with the Kingdom of Hanover by the link of a common

Great Britain and Hanover.

[3] Klüber, Tom. I. § 27. in a note upon States united under the same Sovereign, says, Unio civitatum, sive *perpetua* sit, sive *temporaria*, fit jure (1) vel *societatis* (systema civitatum fœderatarum) (2) vel *imperii* (sub eodem imperante). Hæc est vel *personalis* vel *realis*.

Sovereign Prince during the reign of five successive monarchs of the House of Hanover, was a Personal Union of an *accidental* kind, depending upon the coincidence of the two Crowns devolving upon one and the same person under the Civil Law of Succession in either Kingdom; whilst the connection of the Kingdom of Hungary with the Germanic States of the House of Hapsburg-Lorraine, under one and the same Sovereign Prince, is a Personal Union of a *permanent* character, inasmuch as the Act of Settlement of the Crown of Hungary (anno 1723), by extending the Order of Succession to the female descendants of Rodolph of Hapsburg, has made the Law of Succession in Hungary identical with the Law of Succession in the Germanic States of the House of Hapsburg-Lorraine, so that both Crowns devolve inseparably upon one and the same person. But in either case the *Personal* Union of the two Crowns had no *Real* International significance. The Hungarian Nation before 1867 did not necessarily follow in peace and war the fortunes of the Germanic States of the House of Hapsburg-Lorraine, and the Emperor of Austria might enter into an international compact, to which he was not a party as King of Hungary. On the other hand, the Union of the Empire of Austria with the Kingdom of Hungary, since the withdrawal of Austria from the Germanic Confederation of States, has more the character of a real Union under the Constitution of 1867, inasmuch as the foreign relations of both countries are now directed by one and the same Minister of Foreign Affairs.

Hungary and the Austrian Germanic States.

§ 39. There is another kind of Union of Independent States under one and the same Sovereign Prince, which has an International significance, and may deserve, in a Treatise on the Law of Nations, to

Real Union of Independent States.

be termed a *Real Union*, in contradistinction to the *Personal Unions* which have just been noticed. Thus, the States which are under the sceptre of the Head of the House of Hapsburg-Lorraine may be divided into Germanic and non-Germanic States. The Germanic States of Austria before 1867 formed part of the territory of the Germanic Confederation; they at the same time formed part of the Austrian Empire, and their twofold National character was the subject of International recognition. In a similar manner the Germanic States of the Head of the House of Hohenzollern formed part of the territory of the Germanic Confederation, and at the same time formed part of the Prussian Monarchy. The Duchies of Holstein and Lauenburg were, in an analogous manner, on the one hand States of the Germanic Confederation, and on the other hand parts of the Danish Monarchy[4]. German publicists have accordingly adopted a special term to distinguish in such cases the Whole or Entire Independent State. Thus the Prussian Monarchy, as distinguished from the Germanic and non-Germanic States which compose it, is styled a *Gesammstaat*, or Whole-State. The King of Prussia, for

Gesammstaat or Whole-State.

[4] Great changes, however, have taken place in the international relations of the Elbe Duchies. The King of Denmark renounced all his rights over the Duchies of Holstein and of Lauenburg by the Treaty of Vienna, 30 Oct. 1864, in favour of the King of Prussia and of the Emperor of Austria. By the Treaty of Gastein, 14 Aug. 1865, Austria ceded to Prussia all her rights over the Duchy of Lauenburg, and by a subsequent treaty signed at Prague 23 August, 1866, Austria ceded definitively to Prussia all her rights over Holstein. Prussia has subsequently entered, with the vote of Holstein, into a new Confederation which bears the name of the German Empire, but the King of Prussia has not entered into the new Confederation with his non-German dominions. The Prussian Gesammstaat still exists as distinguished from those States of Prussia which are members of the new German Empire.

instance, may enter into treaty-engagements on behalf of the *Gesammstaat* or entire Prussian Monarchy; or on behalf of the Germanic portion of it, or on behalf of the non-Germanic portion of it. So likewise the King of Denmark might formerly have entered into treaty-engagements on behalf of the *Gesammstaat* or entire Danish Monarchy, which included the two Germanic Duchies, or on behalf of the Germanic Duchies alone, or on behalf of the Danish Provinces alone. These very complicated conditions of International Life were peculiar to certain States which were members of the Germanic Confederation; the Constitution of which was recognised in the Final Act of the Congress of Vienna. The Kingdom of Holland supplied an instance of either kind of Union with a State of that Confederation. There was a *Real* Union between the Kingdom of Holland and the Duchy of Limburg, whilst the *person* of the Sovereign was the only link which united that Kingdom to the Grand Duchy of Luxemburg[5]. Limburg, on the other hand, formed part of the Dutch Monarchy, whilst Luxemburg was as distinct from Holland, as Hanover was from Great Britain during the time when both States were subject to a common Sovereign Prince.

Federal Union of Norway and Sweden.

§ 40. The Union of the Kingdom of Norway and the Kingdom of Sweden comes under different considerations of Public Law. The kingdom of Norway had been *politically* united with the kingdom of Sweden and with the kingdom of Denmark since the

[5] Since the dissolution of the Germanic Confederation of 1815 the Grand Duchy of Luxemburg has become a Separate State under the Sovereignty of the King-Grand Duke, his descendants and successors, and it does not follow the fortunes in peace and war of any other State. It has also been declared by an European Act to form henceforth a perpetually neutral State.

Union of Calmar (anno 1397 [6]). That Union was dissolved *de facto* in the early part of the sixteenth century, when Gustavus Vasa re-established the political Independence of Sweden, and founded a separate dynasty (anno 1523). The Independence of Sweden was formally recognised by Denmark at the peace of Stettin (anno 1570). Norway had meanwhile undergone a political change, and had become a province of Denmark (anno 1536), when its Senate was suppressed, and its Estates ceased to take part in the election of its Kings. Norway and Denmark thenceforth formed a single Independent State for all International purposes; the King of Denmark being recognised Internationally as King of Denmark and Norway. Such was the condition of Norway until the last year of the War of Liberation, when the King of Denmark by the Treaty of Kiel [7], (14 Jan. 1814,) to which Great Britain and Russia were also parties, ceded all his rights of Sovereignty over the kingdom of Norway to the King of Sweden, so "that Norway and its Dependencies should be a kingdom united to that of Sweden." This International settlement was at first repudiated by the Norwegian people, but it was ultimately carried into effect by a Convention [8] concluded at Moss, (14 August, 1814,) between the King of Sweden and the Norwegian Government. The Constitutional relations between the two kingdoms were subsequently settled by an Act [9],

Treaty of Kiel, 14 Jan. 1814.

[6] The monarchy in each kingdom had been an elective monarchy, prior to the Union of Calmar. Under the Act of Union the United monarchy was constituted an elective monarchy, and the monarch was to be elected by the common accord of the Senators, and the deputies of the three Kingdoms. Koch, Tableau des Révolutions, T. I. p. 274.

[7] Martens, N. R. I. p. 666.

[8] Martens, N. R. II. p. 62.

[9] Acte dressé en commun par la Diéte de Norwège et la Diéte de

drawn up in common by the Diet of Norway and the Diet of Sweden; by which it was provided that the kingdom of Norway should form a Free and Independent kingdom, united to Sweden under the sceptre of one and the same monarch, each kingdom retaining its own *Civil* system, but both kingdoms having *one and the same International system.* Accordingly the King has full power on behalf of both kingdoms to declare war, make peace, conclude alliances, and accredit and receive Ministers Plenipotentiary, and has in all matters of war and peace the aid of an extraordinary Council of State, composed of Norwegians and Swedes in common. Meanwhile, each kingdom has its special Commercial Flag, and since 1844 has a special ensign for its military marine, but both such ensigns are acknowledged by Foreign Nations as of identical International import. The Union of Norway and Sweden, if carefully examined, will be found to be a Federal Union based upon a compact between the Norwegian and Swedish Nations. It is classed however by Wheaton under the head of *personal* Unions, and Sir Robert Phillimore adopts the same order of classification, and cites Norway and Sweden by the side of Great Britain and Hanover, and by the side of Prussia and Neuchatel, as affording an example of a personal Union. Klüber, on the other hand, and Heffter and Bluntschli[10], class the Union of Norway and Sweden under the head of *Real* Unions. Klüber ranks it in the same category with the Union of Poland and Russia, which was recognised in Art. I. of the Final Act[11] of the Con-

Suède pour fixer les rapports constitutionnels entre les deux Royaumes, signé à Christiania le 31 Juillet et à Stockholm le 6 Août 1815. Martens, N. R. II. p. 608.

[10] Klüber, § 27. Heffter, § 26. Bluntschli, § 75.

[11] Martens, N. R. tom. II. p. 383.

gress of Vienna, and with the Union of the two Sicilies under the Royal Proclamation of 12 Dec. 1816[12], in pursuance of a previous recognition of the Title of Ferdinard IV, as king of the Two Sicilies, in Art. CIV. of the Final Act. The true characteristic of a Personal Union seems to have been pointed out by Grotius, when he says, that upon the extinction of the reigning house the empire reverts separately to each people[13]. He might have added, that a like separation of the Kingdoms would ensue, if the succession to the respective Crowns should diverge to different members of the reigning House. Such was the result in the instance of Great Britain and Hanover, upon the death of King William IV, when the British Crown, by virtue of British Law, passed to the heir general, and the Hanoverian Crown, by virtue of Hanoverian Law, remained with the heir male of George III. Such a result however cannot arise in the case of Norway and Sweden, as there is an express provision in the Constitutional Act for maintaining the United Monarchy by the election of a new Common Dynasty, if the reigning Prince should at any time be without presumptive heirs, or if the two thrones should become actually vacant. It is apparent, therefore, that the Union of Sweden and Norway is very different from a *Personal* Union. On the other hand, it is not identical with the *Real* Union, which exists between the Independent States which compose a *Gesammstaat,* as Norway has not any International existence apart from Sweden, whereas the Independent States, which compose a

[12] Martens, tom. IV. p. 275.

[13] Grotius, L. I. c. 3. § 7. 2. Extincta domo regnatrice, imperium ad quemque populum seorsim revertitur.

Gesammstaat, enjoy both a separate and a common International existence.

Diversity of Federal Unions.

§ 41. The Union of Norway and Sweden is perhaps almost a solitary instance of a Federal Union under an hereditary Sovereign Prince. The United States of America and the Argentine[14] Confederation are instances of Federal Unions under an Elective President. In the former case, the President is elected for four years, and is immediately re-eligible; in the latter case, he is elected for six years, and cannot be elected a second time until an intervening period of six years has elapsed. The Helvetic Confederation, on the other hand, under the Constitution of 1815[15], was an instance of a Federal Union under the direction of a Representative Council; under its present Constitution, which bears date 29 May, 1874, it ranks in the same class with the United States of America, but the President is elected for one year only, and is not re-eligible until after an interval of one year[16]. Both the Argentine and the Swiss Confederations, although so styled, are strictly speaking Federal Unions equally with the United States of America and the kingdoms of Norway and Sweden. The Germanic Confederation of 1815, on the other hand, although it was an Independent System of States under the direction of a Representative Council, differed so essentially from all other Systems of identical import in the circumstance that the States of the Confederation enjoyed severally a separate Nationality, notwithstanding that they participated in a common German Nationality, that it deserves to be classed in a separate category.

[14] So called from the Rio de la Plata, which intersects it.

[15] Martens, N. R. IV. p. 173.

[16] Constitution Fédérale pour la Confédération Suisse, article 86.

The United States of America.

§ 42. A Confederation of four Colonies, under the title of the United Colonies of New England, (anno 1643,) was the first germ of Union amongst the British Settlements in North America. The subsequent war between Great Britain and France led to a more extensive Confederacy, (anno 1754,) which was to embrace all the then existing British Colonies from New Hampshire to Georgia; but it was at that time supposed that a Federal Union of the Colonies was impracticable. Subsequent disputes with the British government led to a more close association amongst thirteen Colonies, which ultimately declared themselves to be independent of the Mother Country, and agreed to certain "Articles of Confederation and perpetual Union" (15 Nov. 1777[17]). This Confederacy was directed in its external relations by a Congress composed of Delegates from each State, and by the ninth of the Articles, subsequently agreed upon at Philadelphia, on 9th July, 1778[18], it was provided, that the United States in Congress assembled should have the sole and exclusive right and power of determining on peace and war, except in cases[19] mentioned in the ninth article; of sending and receiving ambassadors; of entering into treaties and alliances; of establishing rules for deciding in all cases what captures on land or water should be legal; and of appointing Courts for the trial of piracies and felonies committed on the high seas. The Congress was thus charged with executive functions on behalf of all the United States in International matters, and upon

Articles of Confederation, 15 Nov. 1777.

[17] The American's Own Book, or the Constitutions of the several States in the Union, by J. R. Bigelow. New York, 1848.

[18] Ibid.

[19] Cases of emergency, where a State was actually invaded by enemies, or the danger of invasion was so imminent, as not to admit of delay, until the United States in Congress assembled could be consulted.

the recognition of the Independence of the Confederation by Foreign Powers, the Congress took its place as a National Authority, and was acknowledged to be the representative of the United States of North America in their intercourse with other Nations.

§ 43. The Confederation of 1777 gave place to the more perfect Union of 1787[20], of which the distinguishing features were the consolidation of the Executive Power in the hands of a President, who was to be chosen by electors appointed by each State, and the erection of one Supreme National Judiciary. The Constitutional Act, agreed to in Congress on 28th Sept. 1787, and subsequently ratified by State-Conventions held in each of the thirteen States of the Union, declared that the object of the people of the United States is "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." The Congress of the United States was henceforth to consist of a Senate and a House of Representatives, and it has power to provide, amongst other things, for the common defence and general welfare of the United States; to regulate commerce with Foreign Nations; to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the Laws of the Union; to suppress insurrections and repel invasions. The President, on

Constitution of 1787.

[20] Martens, Recueil, T. iv. p. 288. The American's Own Book, p. 9.

the other hand, is the organ of the Union in its intercourse with Foreign Powers. He has authority to make treaties and to appoint Ambassadors and Consuls; and although he is bound on such occasions to take the advice and obtain the consent of the Senate, this is a regulation of domestic policy, with which Foreign Nations are not concerned, as they can only communicate with the President. No State of the Union can enter into any treaty, alliance, or confederation, nor can any State without the consent of the Congress lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State of the Union or with a Foreign Power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.

Articles of Confederation of 1778.

§ 44. It had been provided, by the Second of the Articles of Confederation of 1778, that each State was to retain its Sovereignty, Freedom, and Independence, and every power, jurisdiction, and right which was not expressly delegated to the United States in Congress assembled. With regard to the *Sovereignty* of each State, it is not within the scope of a treatise on the Law of Nations to examine in what respects and to what extent that Sovereignty has been controlled or modified by the subsequent Constitution of 1787; but with regard to the *Independence* of the several States it may be observed, that the exercise of all those functions which characterise an Independent State, has been delegated by the respective States to the Federal Government, and the National character of each State is so far merged in the National character of the Union. Hence the Federal Government alone maintains international relations with Foreign Powers, and the Federal Union alone can acquire

territory either by occupation or by cession, there being an express provision in the Constitution of the Union that new States may be admitted by Congress into the Union. The Federal Government has power to form and erect into a New State any territory, which the Federal Union may acquire. Thus Louisiana was ceded by France to the United States under the Treaty of 1803, and the Floridas were similarly ceded by Spain in 1809; and the ceded territory in each case was formed into a new State, and admitted in that character into the Union. On the other hand, where an Independent State has joined the Union, a treaty has not been required as a condition precedent to its admission into the Union. Thus Texas had been recognised as an Independent State by the United States, as well as by other Foreign Powers, antecedently to 1844. In that year a Treaty, previously negotiated between Texas and the United States for the admission of Texas into the Union, did not receive the ratification of the American Senate, and it accordingly remained inoperative [21]. The Congress, however, resolved that the territory of Texas might be erected into a State with a Republican Form of Government, and thereupon be admitted as a new State into the Union, in accordance with the Third Section of the Fourth Article of the Constitution [22].

Cession of Louisiana and of the Floridas.

§ 45. The Spanish Provinces on the banks of the Rio de la Plata, in South America, had previously to their separation from the Mother Country been under the Government of a Colonial Viceroy. Upon the

The Argentine Confederation.

[21] Wheaton's Elements, Sixth Edition, p. 78.

[22] Under this article the Congress has power only limited by its discretion to admit as many New States into the Union as it may think proper, in whatever manner the territory comprising those New States may have been acquired.

successful issue of the Insurrection against Spain and the Proclamation of the Sovereignty of the Argentine People, the revolted Provinces constituted themselves a Republic, under the title of the Argentine Confederation. Discord and civil war subsequently broke out between Buenos Ayres and the other Provinces, and, after a contest of fourteen years' duration, a Federal Constitution was drawn up in May, 1853, to which thirteen of the Provinces adhered, whilst Buenos Ayres preferred to stand aloof, and to frame for herself a Constitution, as a separate State [23]. The existing Argentine Confederation, therefore, may be said to date from the year 1853, when the Representatives of the People of the Confederation, assembled in General Congress, decreed and established a Constitution, as recited in the Preamble, with a view to constitute a National Union amongst themselves, to consolidate internal peace, to provide for the common defence, and to secure the liberty of all the inhabitants of the Argentine Soil. The thirteen Provinces, which composed at such time the Argentine State, are Cordova, Catamarca, Corrientes, Entre-Rios, Jujuy Mendoza, Rioja, Salta, Santiago, San Juan, Santa Fé, San Luis, and Tucuman.

The Argentine Confederation a Single State decentralised.

§ 46. The Argentine Confederation has many features in common with the United States of North America; but it has remarkable features of difference, which are attributable to the fact, that the starting point of the Argentine Confederation was diametrically opposite to that of the United States of North America, the former Confederation resulting from the

[23] By a Treaty signed Nov. 10, 1859, Buenos Ayres declared herself to be once more an integral part of the Argentine Confederation. Provision had been made in the Constitution of 1853 for the admission of Buenos Ayres, since which event the internal constitution of the Confederation has been slightly reformed in 1860.

Decentralisation of a Single State [24], whilst the latter arose out of the Union of several States, which had been and might have continued to exist singly as Independent States. The Argentine Constitution of 1853, accordingly, in regard to the external relations of the Confederation, has only confirmed the original Unity of the Argentine State, at the same time that it has altogether decentralised its Internal Government, and has resolved it into a system of Confederate Provinces, which severally possess all the powers of Sovereignty, which are not delegated by the Constitution to the Federal Government [25]. The National Unity, however, of the System, as regards Foreign Powers, is not thereby impaired, and the latter consequently can, under no pretext whatever, entertain direct International Relations with the Provinces without assailing the Nationality of the Argentine State and violating the Independence of the Argentine Nation [26].

The Constitution of the Argentine State.

§ 47. The Executive Power of the Argentine Nation is vested in a President, who is entitled "The President of the Argentine Confederation," and the direction of the International Relations of the Confederation are vested in him conjointly with the Senate. He declares war and peace, nominates and recalls Ambassadors and Consuls, concludes and signs all treaties

[24] We find accordingly that the Argentine Confederation is composed of Provinces and not of States, and that the object of the Confederation is declared to be, amongst other things, to provide for the common defence, and maintain the liberty of all persons who may be disposed to inhabit the Argentine soil, *la liberté pour tous les hommes du monde qui voudraient habiter le sol Argentin.* La Constitution de la Confédération Argentine. Bruxelles, 1856.

[25] Article 101. Les Provinces conservent tout le pouvoir non délégué par cette constitution au gouvernement fédéral.

[26] The Provinces may conclude mutual Conventions with one another upon matters of Police, Public Works, and the Administration of Justice, subject to the sanction of the Federal Congress.

of peace, commerce, navigation, alliance, boundaries and neutrality, all Concordats and other Treaties which may be necessary to maintain friendly relations with Foreign Powers, whose Ministers he receives, and to whose Consuls he grants the Exequatur. The President exercises these latter functions subject to the approval of a Congress, which consists of two Chambers, one composed of "Deputies of the Nation," and the other of "Senators of the Provinces and of the Capital." The Chamber of Deputies consists of Representatives directly elected by the People of the Provinces and of the Capital, considered for this purpose as electoral districts of a single State, in the proportion of one deputy for every 20,000 inhabitants. Each deputy may sit for four years, and he is then re-eligible, but half the members of the Chamber are renewed every two years. The Senate is composed of two Senators from each Province and two from the Capital; each Senator may sit for nine years, and is immediately re-eligible, but a third of the Senate is renewed every three years. The approval of the Congress, which is required by the Constitution to give perfect validity to the acts of the President, is an arrangement of domestic policy, analogous to the arrangements under which the approval of the British Parliament is required by the Constitution to enable the Crown to give effect to *treaties of commerce* concluded with Foreign Powers.

The Argentine Provinces.

§ 48. The Provinces which compose the Argentine State are expressly prohibited by the Constitution from exercising any of the powers which are delegated to the Confederation. They may not conclude any treaties of a political character, or pass any laws affecting commerce or navigation, or establish any

Custom Houses, or levy any troops, or arm any ships of war, except on occasions of sudden invasion when delay is inadmissible, and in which case they must make an immediate report to the Federal Government; nor may they nominate abroad, or receive at home, Foreign Agents. The Provincial Institutions are cast in a Republican mould, and each Province elects its own Governor, but the Governors of the Provinces upon their election become not merely local Functionaries, but are the constituted Agents of the Federal Government in enforcing the Laws of the Confederation. No Province is allowed by the Constitution to declare or make war upon another Province, and a Supreme Court of Justice, modelled after that of the North American Union, has authority to hear and redress all matters and complaints between Province and Province.

The Swiss Confederation of 1648.

§ 49. The Swiss Confederation, in the earliest form in which its Independence was recognised by a Public Act of the European Powers (anno 1648), consisted of thirteen Cantons, Glaris, Schwytz, Uri, Zug, Unterwald, and Appenzell, the political Constitutions of which were democratic, and Bâle, Fribourg, Berne, Lucerne, Zurich, Schaffhausen and Soleure, which had Constitutions more or less aristocratic. The Confederation underwent various vicissitudes during the wars of the French Revolution of 1789, and six other Cantons, some of them being districts which had separated from existing Cantons, were received into the Confederation, namely, St. Gall, Grisons, Argovie, Thurgovie, Tessin and Vaud. In 1803, Napoleon, then First Consul, imposed upon the Confederation, in the character of Mediator between the partisans of a Central State and those of a Federal State, a new Constitution, under the title of an "Act of Mediation,"

which intrusted the interests of the Confederation to a Federal Diet, which was to meet at Fribourg, Berne, Soleure, Bâle, Zurich or Lucerne, year by year, and in each year the Burgomaster of the directing Canton was to be the Landammann of Switzerland, charged with the Presidence of the Diet and with all communications with Foreign Powers. The Act of Mediation was superseded in 1814 by an alliance of a Federal Character between the nineteen Cantons [27], and in the following year three new Cantons, Neuchatel, Geneva, and Valais, were admitted into the Confederation, so that the new Act of Confederation, concluded 7th August, 1815, embraced twenty-two Cantons [28]. It was this new Confederation, which acceded formally to the territorial arrangements of the Congress of Vienna on 12 August, 1815; and, in consideration of its accession, the perpetual neutrality of Switzerland and the inviolability of its soil were recognised and guaranteed by the Powers, which signed the Final Act of the Congress.

The Helvetic Confederation of 1815.

§ 50. The Helvetic Confederation of 1815 was an Union of a closer kind than the early Federal Pact, which had preceded the Constitution under the Act of Mediation. Its object was declared to be the preservation of the freedom, independence and security against foreign assault, and of the domestic order and tranquillity of the twenty-two Cantons. The Cantons guaranteed reciprocally to one another their respective political Constitutions and their territorial Possessions. The Confederation had a common army, composed of contingents of men from each Canton, and a common military chest, supplied by duties levied on the importation of foreign merchandise, and collected by the frontier Cantons. The Diet consisted of one deputy

[27] Martens, N. R. II. p. 68. [28] Martens, N. R. IV. p. 173.

from each Canton voting according to instructions, and it assembled at Berne, Zurich, or Lucerne alternately. The direction of the affairs of the Confederation, when the Diet was not in session, was confided to the Canton in which it ought to assemble, and the duties of Directing Canton (Vorort) accordingly devolved every alternate two years upon the Protestant Canton of Zurich and the Roman Catholic Cantons of Berne and Lucerne. All the functions which had belonged to the Directing Authority of the Confederation before 1798, were, under the new Constitution, continued to the Directing Canton. The Diet had the prerogative of declaring war and concluding treaties of peace, alliance, and commerce with Foreign States. It provided for the internal and external security of the Confederation, directed the operations and appointed the Commanders of the Federal Army, and nominated the Ministers accredited to Foreign Powers. In case of internal or external danger, each Canton had the right of demanding the aid of the other Cantons, in which case notice was to be given immediately to the Directing Canton, in order that the Diet might be called together to provide the necessary measures of security. Under the Federal Compact prior to 1798, the Cantons might make separate treaties with one another or with Foreign Powers. Under the Confederation of 1815, the individual Cantons were precluded from concluding any alliance which might be prejudicial (nachtheilige) to the General Confederation, or to the right of the other Cantons.

The Vorort or Directing Canton.

§ 51. The French Revolution of 1830 led to various changes in the Internal Constitutions of the different Cantons, and a plan for the revision of the Federal Pact of 1815 was drawn up by a Committee of the

The League of Sarnen.

Diet in 1832. The object of the revision was mainly to assign to the Federal Authorities more of the attributes of a Central Government than they had hitherto possessed; but the scheme was vigorously opposed by Seven Cantons, namely, Schwytz, Uri, Unterwald, Bâle, Tessin, Neuchatel and Valais. These Cantons united themselves together in a separate Confederation, called *the League of Sarnen.* The Diet of 1833 took the necessary measures for dissolving the League of Sarnen, and for compelling the seceding Cantons to send Deputies to the National Diet. The question of the revision of the Federal Pact was renewed in 1834, but unsuccessfully. In 1846 a separate armed League of the Seven Catholic Cantons was formed, under the title of *Sonderbund,* which was in fact an armed Confederation within the Confederation. This association being at variance with the Sixth Article of the Federal Pact, it was resolved by the Diet that it should be put down by force of arms, which was accordingly effected. The eventful political changes, which convulsed Europe in 1848, contributed to bring about a change in that year in the Constitution of the Confederation, whereby it more nearly approximates at present to the model of the Federal Union of the North American States.

The Sonderbund.

The Swiss Confederation of 1848.

§ 52. The existing Constitution of the Swiss Confederation was voted by the Diet, on 29th May, 1874. The Confederation consists, as under the settlement of 1815, of twenty-two Cantons; but of these Bâle is divided into Bâle-town and Bâle-country; Unterwalden into Upper and Lower Unterwalden; and Appenzell into Outer and Inner Rhodes. The object of the Confederation is declared to be to secure the Independence of the Country (la patrie) against foreign assault, to maintain tranquillity and order in

the Interior; to protect the liberty and rights of the Confederates; and to promote their common prosperity. The Cantons are respectively Sovereign in all matters in which their Sovereignty has not been limited by the Federal Constitution. The Cantons are forbidden to enter into any private alliance or any treaty of a political character with one another, but they may conclude with one another Conventions upon matters of Legislation, Administration, and Justice, subject to the approval of the Federal Authority. The Confederation alone has the right of declaring war and concluding peace, as well as of making alliances and treaties with Foreign Powers, and more especially treaties of commerce, and of regulating the custom-duties on foreign imports. The Cantons retain the right of concluding with Foreign States conventions on matters of Public Economy and relations of Neighbourhood and Police; but these conventions must contain nothing prejudicial to the Confederation, or to the rights of the Cantons, and all official relations between the Cantons and Foreign Governments are carried on through the medium of the Federal Council, saving always to the Cantons the right of corresponding with the authorities of a Foreign State on matters within the scope of their Cantonal Conventions. The Confederation determines the conditions under which strangers may obtain Swiss naturalisation, and under which Swiss citizens may renounce their Swiss national character. The Confederation is also empowered to expel from its territory strangers who compromise either the Internal or the External security of Switzerland. The Federal Authorities consist of a Federal Council and a Federal Assembly; the latter consisting of two Sections or Councils, a National Council, and a Council of States. The National Council is

The Federal Assembly.

composed of Deputies of the Swiss People, in the proportion of one Deputy for every 20,000 citizens, and every natural-born Swiss of the age of twenty years complete, unless under some legal disability, has a right to vote for members of the National Council; and, if a layman, is eligible as a Deputy. The National Council is elected for three years, and the whole body is renewable at each election. The Council of States, on the other hand, is composed of forty-four Deputies of Cantons, two Deputies being nominated by each Canton; and in the case of the divided Cantons, one Deputy is nominated by each Half-Canton. Each Council chooses for each Session a President and a Vice-President from its own body. These officers are not re-eligible until a session has intervened. One of the most important functions of the Federal Assembly is to select the Federal Council, which is the Supreme Executive body, and the directing authority of the Confederation. For this purpose the National Council and the Council of States meet in one body, and elect seven persons, who must be Swiss Citizens, qualified to be members of the National Council, and who upon their election become members of the Federal Council for three years, and during such time are precluded from any other employment. The Federal Council must be renewed entirely upon each renewal of the National Council. The President of the Federal Council is the President of the Confederation, and he is selected, as well as the Vice-President of the Federal Council, from amongst the seven members of the Federal Council by the Federal Assembly. The President of the Confederation holds office for one year, and is not re-eligible. Four members must be present to enable the Federal Council to deliberate. The Federal Council nominates to Foreign Missions, examines all treaties

The Federal Council.

concluded either amongst the Cantons or with Foreign States, and approves them, if it thinks fit. It watches over the interests of the Confederation abroad, and more particularly over its International relations; and is in general charged with the superintendence of the external relations of the Confederation, and with the maintenance of its Independence and its Neutrality.

Analogy between the Swiss Confederation and certain Federal Unions.

§ 53. It will be seen that the existing Constitution of the Swiss Confederation bears a very close resemblance to the Federal Union of the North American States, and to the Federal Union of the Argentine Provinces. Each of these Confederations is for all International purposes a single Independent State. Each of them is only known to Foreign Powers through the medium of the Supreme Federal Government, which for all external purposes represents the Nationality of the entire Federal Body. A Federation of this kind is essentially a very different body from what is ordinarily understood by a Confederation of States. Heffter[29] accordingly, and other German Jurists, have employed the term *Bundesstaat*, or Federal State, to denote an Union of States, which is formed on a basis of equal rights, and rests upon a compact of Public Law (fœdus), under which the individual States are merged for all International purposes in the Union. The term Confederation of States (*Staaten-Bund*), according to these writers, is properly applicable to an association of Independent States, each member whereof severally retains its own Nationality, whilst it participates at the same time in the common Nationality of the Confederation. The Germanic Confederation was an association of this latter character. It was composed of Inde-

Bundesstaat or Federative State.

Staaten-Bund, or Confederation of States.

[29] Heffter, § 20.

pendent States, which had substituted for their ordinary rights and duties in relation to one another under the Law of Nations special rights and duties under the Articles of Confederation. They at the same time *severally* retained, in regard to non-Germanic Powers, all their rights and duties under the Law of Nations ; whilst they had *collectively* acquired in relation to those Powers special rights and duties, as a Community of States, by virtue of the International recognition of the Articles of Confederation. Thus the Germanic Confederation was acknowledged by the representatives of the European Powers, at the Congress of Vienna, to have the right in its Collective capacity of making war and peace, of sending and receiving Embassies, and of forming alliances and treaties within the scope of its institution ; which was declared by the Articles of Confederation to be the maintenance of the Independence of the individual States, and the inviolability of their territory. The Confederation was in fact an association in the nature of a permanent League of Independent States, differing so far from an ordinary League, that it was clothed with a common National character for certain purposes, and its Right of common action within a certain sphere of International rights and obligations formed part of the Conventional Law of Europe.

Origin of the Germanic Confederation.

§ 54. The origin of so anomalous a body as the Germanic Confederation was traceable to a political necessity. In consequence of the creation of the Confederation of the Rhine under the protection of the Emperor Napoleon, and the subsequent abdication of the Crown of the Roman Empire of the Germans by the Emperor Francis[30] (August 6, 1806), not only the substance but the name of a Germanic Political Body

[30] Martens, Recueil, T. viii. p. 407.

had disappeared. It became, however, necessary after the successful conclusion of the War of Liberation, to create another Germanic Political Body, partly to satisfy the deep-seated feeling of Nationality amongst the people of the Germanic States; partly to fill up the void which the disappearance of the Germanic Empire had caused in the centre of the European Political System. It was impossible to revive the ancient Empire without the sacrifice of the Sovereign rights, which the former Vassals of the Emperor and the Empire had enjoyed since the Dissolution of the Empire in 1806, and it was neither reasonable to demand nor practicable to enforce such a sacrifice. The Emperor Francis accordingly repudiated the advice of those who urged him to resume, as a matter of course, the Crown of the Roman Empire of the Germanic Nation. Others spoke in favour of a new Germanic Empire to be fashioned according to the requirements of the times. The majority of the German Princes, who had been admitted to the full enjoyment of Sovereign rights, were in favour of a simple political alliance amongst all the Sovereign Germanic States. The Emperor Francis rejected the idea of a new Germanic Empire, as it would have had the support only of political enthusiasts, and would have been opposed by the German Princes and the loyal portion of their subjects. On the other hand, a mere alliance between the Sovereign States of Germany did not offer in the opinion of the Imperial Cabinet sufficient guarantees for maintaining the tranquillity of Germany, and might even have proved to be a measure in its results antagonistic to that object. The Emperor Francis accordingly insisted on a Confederation of States, which would be compatible with the independence of the Sovereign Princes and States of Germany, and

would at the same time secure the integrity of the Germanic territory. The acquiescence of Russia, Prussia, and Great Britain in this scheme was made a *conditio sine quâ non* of Austria's accession to the Quadruple Alliance in 1813. The Sixth Article of the Treaty of Peace concluded at Paris between the Four Allied Powers and France (30 May, 1814) put the seal to the settlement of the previous year. "Les Etats de l'Allemagne seront indépendans et unis par un lien fédératif[31]." The Sovereign Princes and Free Cities of Germany in accordance with this stipulation empowered their Representatives to draw up certain Articles in the form of an Act of Federation, which was subsequently embodied in the Principal Act of the Congress of Vienna, and thus the German Federal Act became a recognised part of the Public Conventional law of Europe.

The Federal Act of 1815.

§ 55. There was a provision in the Federal Act, that the Diet should draw up as soon as possible a body of Fundamental Laws for the Confederation, and should settle its Organic institutions in regard to its external, military, and internal relations. A series of Ministerial Conferences accordingly took place at Vienna for the purpose of completing and consolidating the Organization of the Confederation, and the result of these Conferences was embodied in a Final Act (Schluss-Act), which received the signature of the Representatives of all the Sovereign Princes and Free Cities of Germany at Vienna (15 May, 1820), and which was subsequently approved by the Diet at Frankfort (8 June, 1850), and by an unanimous Resolution converted into a Fundamental Law of the Confederation, having the same force and validity as the Federal Act itself. It was therefore

[31] Martens, N. R. II. p. 6.

in the Final Act[32] that the Constitution of the Germanic Confederation was developed and completed in its various details, pursuant to the Provisions of Article X of the Federal Act, which was textually inserted as Article LXII in the Principal Act[33] of the Congress of Vienna.

The Federal Act defined the object of the Confederation in Article II to be the maintenance of the external and internal security of Germany, and of the independence and inviolability of the Confederated States. The States of the Confederation bound themselves by Article XI to defend not only Germany in its entirety, but also each Individual State of the Union in case it should be attacked, and they mutually guaranteed to one another all such their possessions as were comprised within the Union. When war was declared by the Confederation, no member could carry on private negotiation with the enemy, nor make a peace or an armistice without the consent of the others. The Members of the Confederation, in reserving to themselves the right of forming alliances, obliged themselves not to contract any engagement, which should be prejudicial to the security of the Confederation or of the Individual States which composed it. The Confederate States undertook not to make war against one another on any pretext whatever, but to refer all their disputes to the Diet for its Mediation.

§ 56. The *Final Act*, which consisted of Sixty-five Articles, developed more fully and explicitly the Fundamental Dispositions of the Federal Act in regard to the external relations of the Confederation in Sixteen Articles, consecutively from the Thirty-fifth to the Fiftieth inclusively. It was declared in Article XXXV, that the Confederation had the right, as a

Final Act of 1820.

[32] Martens, N. R. V. p. 466. [33] Ibid. N. R. II. p. 409.

Collective Power, to declare war, make peace, and contract alliances and negotiate treaties with due regard to the objects of its Institution, as announced in Article L of the Federal Act, namely, its own defence, the maintenance of the inviolability and external security of Germany, and of the independence and inviolability of each of the States of the Confederation. Article XXXVI declared that any damage caused to any Confederate State by a Foreign Power was a damage to the whole Confederation by virtue of the reciprocal guaranty of the integrity of their possessions, and on the other hand, the Confederated States undertook to refrain from giving any provocation to Foreign Powers. In case a Foreign Power should make complaint against a State, the Diet was empowered to require the State, if it was in the wrong, to make redress to the Foreign Power. Article XXXVII provided, that the Diet might examine into the origin of any differences which might arise between any State of the Confederation and a Foreign Power, and either refuse its aid if the State was in the wrong, or if the State was in the right, employ its good offices in its behalf. Article XXXVIII provided, that if there was reason to apprehend danger to any State of the Confederation, or to the whole body, the Diet should immediately adopt the necessary measures of defence. Article XXXIX provided, that if the Territory of any State of the Confederation was invaded, the fact of such invasion constituted a state of war for the whole Confederation, and the necessary measures of defence had to be at once adopted. Article XL provided, that if it should be necessary for the Confederation to make a formal Declaration of war, the General Assembly on its behalf should make such Declaration, if a majority of two-thirds so decided. By Article XLI,

a Resolution of the Diet, that there was real danger of an hostile attack, or a formal Declaration of War on the part of the General Assembly, constituted all the Confederated States active parties in the war. Article XLII provided, that if the Diet should decide in the negative against there being any real danger of an hostile attack, the States which did not share the opinion of the majority of the Diet might concert among themselves measures of common defence. Article XLIII provided, that the Diet might mediate, if requested, between a Foreign Power and any Confederated State, which considered itself to be in particular danger of a foreign attack, if both the disputing parties consented to its mediation. Article XLIV provided, that every State, when war had been declared, might furnish any number of troops above its contingent at its own expense. By Article XLV the Diet was empowered to take the necessary steps to maintain the neutrality of the territory of the Confederation, if it should be threatened in a war between Foreign Powers, or otherwise. Article XLVI provided, that if a Confederated State, having possessions beyond the limits of the Confederation, undertook a war, as an European Power, the Confederation remained a stranger to such war. Article XLVII was a very important Article, as the protection of the Confederation was thereby extended to territory beyond its own limits. It provided, that in case any State was menaced or attacked in its possessions not comprised within the Confederation, the Confederation was not to adopt any measures of defence, nor to take an active part in the war, until the Diet should have recognised in its Permanent Council by a majority of voices the existence of danger to the Territory of the Confederation, in which case all the dispositions of the previous

Articles should equally apply. Article XLVIII provided, that the dispositions of the Federal Act which precluded every State, after war had been declared by the Confederation, from holding any private negotiations or making a separate peace or armistice, should apply equally to all States, whether they possessed or not territory beyond the limits of the Confederation. Article XLIX provided, that when peace was to be made, a Committee of the Diet should direct the negotiations, and Plenipotentiaries from the Diet should conduct them. The ratification of all treaties of peace should only be pronounced by the General Assembly. Such was the organization of this remarkable National League for the security and defence of the Germanic soil from foreign attack.

The International Functions of the Diet.

The Ordinary Functions of the Diet in regard to Foreign Relations of Peace were regulated by Article I. It was authorised as the organ of the Confederation, To watch over the maintenance of peace and friendly relations with Foreign Powers. 2. To receive the Envoys of Foreign Powers, who might be accredited to the Confederation, and to nominate Envoys to Foreign States, if it was judged necessary. 3. To conduct negotiations and to conclude treaties on behalf of the Confederation. 4. To employ its good offices with Foreign Powers on behalf of any of the Members of the Confederation who might claim them, and to employ them also with the States of the Confederation, if Foreign Governments should request their intervention. In accordance with the

Diplomatic Relations.

second provision of the above Article, Diplomatic Relations between the Confederation, in its character of an European Power, and the Non-Germanic Powers of Europe, were habitually maintained by permanent Missions accredited by the latter Powers to the Ger-

manic Confederation at Frankfort, but the Diet did not judge it necessary to accredit Resident Envoys on behalf of the Confederation to any Foreign Powers. It was only on extraordinary occasions, as in the case of negotiations which affected the interests of the Confederation, as a Federal System of States, that the Diet appointed Plenipotentiaries to treat with Foreign Powers[34]. The respective States of the Confederation meanwhile both accredited and received Resident Plenipotentiaries, to superintend their separate International Relations with Non-Germanic Powers.

The Ordinary Assembly of the Diet.

§ 57. It is not within the scope of the present treatise to examine at any length the Internal Constitution of the Germanic Confederation of 1815, further than as it may serve to throw light upon the Constitution of the New Confederation of 1871, which bears the name of the German Empire. The affairs of the Confederation, as a Federal System of States, were intrusted to a Federative Diet, which sat at Frankfort on the Maine, and in which each State was represented by a Minister Plenipotentiary. This Diet bore no resemblance except in name to the Diet of the Ancient Empire, which consisted of three Colleges, each independent of the other, and the Decrees of which required the assent of the Emperor to give them validity. Whereas this Federative Diet was a collective Sovereign Assembly, which exercised its functions in absolute independence of any Superior

[34] Thus the Plenipotentiaries of Austria and of Prussia respectively were constituted Plenipotentiaries of the Diet of the Germanic Confederation, and in that character acceded on behalf of the Confederation to the Treaty of London, (19 April, 1839,) whereby certain portions of the Grand Duchy of Luxemburg (Germanic Soil) were ceded to Belgium in exchange for portions of the Province of Limburg. Martens, Nouveau Recueil, XVI. p. 791.

Political Authority. The Plenipotentiaries of the States, who were bound by their instructions and could not act without them, voted in the Diet under different conditions, according as they were convened in the Ordinary Assembly of the Diet, or in the General Assembly. When the Plenipotentiaries met in the Ordinary Assembly, or Permanent Council, eleven of them exercised respectively an individual vote, but the remainder voted in six separate groups, two or more States, as the case might be, having the right of giving only a single vote collectively. The votes were thus arranged without prejudice to the rank of the Members :—

1.	Austria	1
2.	Prussia	1
3.	Bavaria	1
4.	Saxony	1
5.	Hanover	1
6.	Würtemberg	1
7.	Baden	1
8.	Electoral Hesse	1
9.	Grand Ducal Hesse	1
10.	Denmark (for Holstein)	1
11.	Netherlands (for Luxemburg)	1
12.	Grand-Ducal and Ducal Houses of Saxony	1
13.	Brunswick and Nassau	1
14.	Mecklenburg Schwerin and Mecklenburg Strelitz	1
15.	Holstein-Oldenburg, Anhalt and Schwarzburg	1
16.	Hohenzollern, Liechtenstein, Reuss, Schaumburg-Lippe, Lippe (Detmold) and Waldeck	1
17.	The Free Cities of Lübeck, Frankfort, Bremen and Hamburg	1
	Total Votes	17

Admission of Hesse-Homburg, 7 July, 1817.

Hesse-Homburg was not admitted into the Confederation until 7 July, 1817 [35], when it was allowed to

[35] Meyer, Staats-Acten des Deutschen Bundes, Tom. II. p. 71.

share the collective vote of Hohenzollern and its co-ordinate States. The Plenipotentiary of Austria was entitled to preside in the Diet. Each State of the Confederation had the right to propose any measure for consideration, and the President was bound within a given time to bring it before the Diet. Such was the Constitution of the Diet in what was termed the Ordinary Assembly or Close Council.

The Plenum or Full Chapter of the Diet.

§ 58. The Diet formed itself into a General Assembly termed the *Plenum*, or Full Chapter, whenever it was necessary to decide upon questions touching the enactment or the modification of Fundamental Laws, or the adoption of measures affecting the Federal Act itself, or the Organic institutions and other arrangements of common interest to the States of the Confederation. In this Assembly every State had a separate voice, the larger States being allowed a greater number of votes in the following proportions:—

1.	Austria	4
2.	Prussia	4
3.	Saxony	4
4.	Bavaria	4
5.	Hanover	4
6.	Würtemberg	4
7.	Baden	3
8.	Electoral Hesse	3
9.	Grand Ducal Hesse	3
10.	Holstein and Lauenburg	3
11.	Luxemburg	3
12.	Brunswick	2
13.	Mecklenburg-Schwerin	2
14.	Nassau	2
15.	Saxe-Weimar	1
16.	Saxe-Gotha	1
17.	Saxe-Coburg	1
18.	Saxe-Meiningen	1

19. Saxe-Altenburg[36]	1
20. Mecklenburg-Strelitz	1
21. Holstein-Oldenburg	1
22. Anhalt-Dessau	1
23. Anhalt-Bernburg	1
24. Anhalt-Köthen	1
25. Schwarzburg-Sondershausen	1
26. Schwarzburg-Rodolstadt	1
27. Hohenzollern-Hechengen	1
28. Liechtenstein	1
29. Hohenzollern-Siegmaringen	1
30. Waldeck	1
31. Reuss (elder branch)	1
32. Reuss (younger branch)	1
33. Schaumburg-Lippe	1
34. Lippe-Detmold	1
35. Lübeck	1
36. Frankfort	1
37. Bremen	1
38. Hamburg	1
Total Votes	69

Upon the admission of Hesse-Homburg into the Confederation, (7 July, 1817,) that State became entitled to a single vote in the Full Chapter; so that there were seventy voices in the General Assembly. The Diet, in its Ordinary Assembly, had the right of deciding by a majority of votes, whether any question should be submitted to the votes of the General Assembly. The Ordinary Assembly had the right of full discussion, and prepared the resolutions to be submitted in the General Assembly, which had no right of discussion; but simply exercised a right of approval or disapproval by a majority of two-thirds of all its votes. The Diet sat permanently, but it had a power of adjourning itself, after it had com-

[36] Formerly Saxe-Hildburghausen.

pleted its deliberations on any subject, for a period not longer than four months. It will be seen, that as forty-seven votes were required in the General Assembly to constitute a majority of two-thirds, an affirmative decision of the General Assembly implied a greater amount of common agreement amongst the Confederated States than an affirmative decision of the Ordinary Assembly, and that when a combination of the more powerful States might have succeeded in carrying a measure in the Ordinary Assembly, a combination of the less powerful States might be enabled to reject it in the General Assembly. Such was the original conception of the General Assembly in the Federal Act, by the Sixth and Seventh Articles of which it had been provided, that two-thirds of the votes of the Full Chapter should constitute a majority in respect of such matters of common interest as came within its province. It was, however, subsequently provided by the Fourteenth Article of the Final Act, that in regard to Organic institutions, whereby are meant permanent arrangements, serving as means of executing the objects directly connected with the acknowledged end of the Confederation, the General Assembly ought to be unanimous in assenting not merely to the preliminary question, whether they should allow any measure at all under the circumstances to be laid before them, but also in approving the principle and the essential arrangements of any plan which might be proposed. If the General Assembly should decide in favour of the project submitted to them, the details of its execution were to be referred to the Permanent Council, which was to decide all questions which might arise as to those details by an absolute majority of votes, with power to appoint a Committee to reconcile divergent opinions.

A Majority of Two-Thirds.

Unanimity of the Diet.

Permanent character of the Germanic Confederation.

§ 59. By Article XI of the Federal Act, the States of the Confederation mutually guaranteed to one another all such portions of their Possessions as were comprised within the Confederation. By Article V of the Final Act, no State was at liberty to detach itself from the Confederation; and by Article VI no new member could be admitted into the Confederation, without the unanimous assent of all the Confederated States. No change which might take place in the state of the Possessions of the members of the Confederation could affect their rights and engagements in reference to the Confederation without the consent of the Confederation. No State could voluntarily cede its rights of Sovereignty over any portion of its territory within the Confederation to any non-Confederate Power without the consent of the Confederation. The National Unity of the Confederation, in regard to all matters affecting its territory, was thus complete. We find, accordingly, that upon the signature of the definitive Treaty of London[37], (19 April, 1839,) whereby the King of Holland ceded to the King of the Belgians a portion of the Grand Duchy of Luxemburg in exchange for a portion of the province of Limburg, not merely was the recognition of the Five Great Powers formally granted to the dissolution of the political Union, which existed between Holland and Belgium, in pursuance of the Treaty of Vienna, of 31 May, 1815; but the Germanic Confederation by its Plenipotentiaries, formally acceded to the territorial arrangements, which had been concluded between the Five Great Powers, on the one hand, and Holland and Belgium on the other hand; and under which the King of Holland, as Grand Duke of Luxemburg, had ceded to the King

Treaty of London, 19 April, 1839.

[37] Martens, Nouveau Supplément, T. XVI. p. 791.

of the Belgians a portion of the Grand Duchy of Luxemburg within the territory of the Confederation, in consideration of a territorial Indemnity within the Province of Limburg. The Confederation having thus acceded, in its character of an European Power, to the International readjustment of a portion of its territory, it remained for the Diet to order Constitutionally, according to the provisions of the Final Act, such arrangements as might be necessary between the Confederation and the Grand Duke of Luxemburg, as one of its members, consequent on the altered circumstances of the Grand Duchy.

The German Empire of 1871.

§ 60. The Germanic Confederation of 1815 was the creation, as already observed, of a political necessity. It was a compromise between the minor States and the two great Powers. It lasted, however, more than fifty years in spite of certain defects in its Constitution, and notwithstanding that full effect could not be given to that Constitution from a want of harmony in the policy of the two great Powers. War ultimately broke out between these two Powers, the issue of which was disastrous to Austria, who finally under Article IV of the Treaty of Prague (23 August, 1866) acknowledged the dissolution of the Germanic Confederation as hitherto constituted, and gave her consent to a new organization of Germany without the participation of the Imperial Austrian State. Austria likewise promised to recognise the more restricted Federal relations, which Prussia proposed to establish to the north of the line of the River Maine, and declared her concurrence in the formation of an Association of the Germanic States to the south of that line, whose national connection with the North German Confederation was reserved for further arrangement between the parties, and which would

have an independent international existence. A further result of this Treaty was that the King of Prussia declared the Kingdom of Hanover, the Electorate of Hesse Cassel, the Duchy of Nassau, and the Free City of Frankfort, by a decree bearing date 20 Sept., 1866, and by various Royal Letters Patent, to be united for ever to the Prussian Monarchy, and took possession of them by right of conquest and in consequence of a war, which as alleged by Prussia had been commenced by them in alliance with Austria and in violation of the Federal Law then in force. The annexation of these four States by Prussia, who had already occupied the Duchy of Holstein by right of conquest over the King of Denmark, was a necessary preliminary to the formation of a North German Confederation, the Constitution of which, as promulgated on 14 June, 1867, it is unnecessary to examine as it was merely preparatory to a more complete Union of the Constituent States in a new Confederation, which bears the name of the German Empire. The same observation will apply to the Association of the Germanic States to the south of the line of the Maine, which have also been admitted into this more complete Union, which is declared in the preamble of its Constitution to be an everlasting Confederation for the Protection of the Territory of the Confederation and the rights thereof, as well as to care for the welfare of the German people. It is this Confederation which bears the name of the German Empire, of which the Presidency is declared by Article XI of its Constitution to belong to the King of Prussia, who bears the name of German Emperor. His functions are to represent the Empire internationally, to declare war and to conclude peace in the name of the Empire, to enter into alliances and other treaties with Foreign

Powers, and to accredit and to receive Ambassadors. The consent however of the Council of the Confederation is necessary for a declaration of war in the name of the Empire, unless an attack on the territory or the coast of the Confederation has taken place. Further, in so far as Treaties with foreign States may have reference to Affairs which in accordance with Article IV belong to the jurisdiction of the Imperial legislature, the consent of the Council of the Confederation is requisite for the conclusion of such treaties, and the Sanction of the Imperial Diet for their coming into force.

The Council of the Confederation, which corresponds in some respects in its organization with the *Plenum* or Full Chapter of the former Confederation of 1815, consists of the Representatives of the members of the Confederation, amongst which the votes are divided in such a manner that Prussia has together with the former votes of Hanover, Electoral Hesse, Holstein, Nassau, and Frankfort seventeen votes, the total number of votes being fifty-eight, divided in this manner:—

1.	Prussia with the five annexed States	17
2.	Bavaria	6
3.	Saxony	4
4.	Würtemberg	4
5.	Baden	3
6.	Hesse (Grand Ducal)	3
7.	Mecklenburg-Schwerin	2
8.	Saxe-Weimar	1
9.	Mecklenburg-Strelitz	1
10.	Oldenburg	1
11.	Brunswick	2
12.	Saxe-Meiningen	1
13.	Saxe-Altenburg	1
14.	Saxe-Coburg-Gotha	1
15.	Anhalt	1
16.	Schwarzburg-Rudolstadt	1

17. Schwarzburg-Sondershausen	1
18. Waldeck	1
19. Reuss (elder line)	1
20. Reuss (younger line)	1
21. Schaumburg-Lippe	1
22. Lippe	1
23. Lübeck	1
24. Bremen	1
25. Hamburg	1
Total Votes	58

Each member of the Confederation can nominate as many Plenipotentiaries to the Council of the Confederation as it has votes, but the totality of votes can only be given in one sense.

The Council of the Confederation elects permanent Committees from its own members for seven different departments of internal affairs, and besides these a Committee for foreign affairs is formed in the Council of the Confederation, comprising the Representatives of the Kingdoms of Bavaria, Saxony, and Würtemberg and two other Representatives of other Confederated States, who are elected annually to the Council, and in this Committee Bavaria is entitled always to occupy the Chair. Every member of the Council of the Confederation has a right to appear in the Imperial Diet and must at all times be heard, if he so desires, in order to represent the views of his Government, even when those views have not been adopted by a majority of the Council. No one may at the same time be a member both of the Council of the Confederation and of the Imperial Diet.

The Imperial Diet is elected by universal and direct election with secret votes, the total number of members being 382. The elections take place in accordance with a Federal Electoral Law.

It will be seen that the extinct Germanic Confederation of 1815–1866 was strictly speaking a Confederation of independent States, entitled to be classed under the most ancient category of such Unions, of which the Confederation of the United States of America from 1776 to 1787, and the Swiss Confederation from 1804 to 1848, were examples.

This peculiar class of Confederated States is by German Jurists distinguished by the term Staaten-Bund from the closer union of States known as a Federal State (Bundes-Staat), of which the United States of America since 1787, and the Swiss Confederation since 1848, are instances. On the other hand the present Germanic Confederation, which bears the name of the German Empire, has been distinguished by German Jurists from a Staaten-Bund by a phrase specially coined for the occasion, and it is classed by them under the head of Staaten-Reich. It is difficult, however, to discover any international feature of difference between the German Empire of 1871 and a Staaten-Bund. The difference, in fact, between them seems to be formal, in so far as the Executive Chief of an ordinary Federative State is styled a President, whereas the Executive Chief of the German Empire of 1871 bears the title of Emperor. There is something, however, to be said in favour of adopting this new classification as regards the international character of the German Empire of 1871, but then both the Ottoman Empire, and the Austro-Hungarian Monarchy may from a certain point of view be also properly designated by the same phrase, inasmuch as they consist of "States" and not of "Provinces," and the Executive Chief is styled an Emperor, not a President.

CHAPTER IV.

THE OTTOMAN EMPIRE.

International Relations of the Mahommedan World—Admission of the Porte into the Concert of European Nations—Treaty of Paris, 30 March, 1856—Declaration of Maritime Law, 16 April, 1856—Constitution of the Ottoman Empire—Normal division into Vilayets—Christian and Mahommedan Dependencies—The States on the Barbary Coast—Algiers, formerly a vassal State of the Ottoman Empire, now a dependency of France—Tripoli, formerly an hereditary Regency, now a Vilayet of the Ottoman Empire under a removable Vali—Tunis, lately a Vilayet of the Ottoman Empire, now under a French Protectorate—Egypt, formerly a Vilayet, now a vassal State of the Ottoman Empire under an hereditary Khedive—Treaty of London, 15 July, 1840—Principality of Samos, an autonomous dependency of the Porte under a Christian Prince, paying tribute to the Porte—Diplomatic Note of 10 Dec., 1832—Bulgaria, an autonomous and tributary Principality under a Christian Prince—Treaty of Berlin, 1878—Eastern Roumelia, an autonomous Province under a Christian Vali nominated by the Porte in consultation with the Signatory Powers of the Treaty of Berlin, 1878—The Lebanon, an autonomous Province under a Christian Governor-General, nominated by the Porte after consultation with the Signatory Powers of the Treaty of Paris of Sept. 5, 1860—Bosnia and Herzegovina under Treaty-Arrangements occupied and administered by Austria-Hungary—The Island of Cyprus occupied and administered by Great Britain under a Treaty of Alliance with the Porte of 4 June, 1878.

International Relations of the Mahommedan World.

§ 61. THE International Relations of the Ottoman Porte with the Christian Powers of Europe have undergone a remarkable change and received an extraordinary development during the last preceding fifty years. At the commencement of the present

century, it would not have been incorrect to have described those Relations as resting solely on compact. Such, indeed, was the view adopted by Lord Stowell in 1804, when he was called upon to administer the Public Law of Europe in matters wherein the interests of Ottoman Subjects were concerned, "The Inhabitants of the Ottoman Empire," he observes [1], "are not possessors of exactly the same Law of Nations with ourselves. In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed its disposition not to hold them bound to the utmost rigour of that system of Public Law, on which European States have so long acted in their intercourse with one another." The same distinguished Jurist, on another occasion [2] when the acts of an established Mahommedan Government were impugned, observed that "although their notions of justice to be observed amongst Nations differ from those which we entertain, we do not on that account venture to call in question their Public Acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the *Established Custom* of that part of the world. There might perhaps be cause of capture, according to their notions, for some infringement of the Regulations of a Treaty, as it is by the Law of Treaty only that these Nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other Law of Nations but that which is derived from positive compact and convention."

Law of Treaty.

[1] The Madonna del Burso, 4 c. Robinson's Admiralty Reports, p. 172.

[2] The Helena, 4 c. Robinson's Admiralty Reports, p. 6.

Wheaton has adopted an identical view of the International Relations of the Mahommedan world. "The European Law of Nations," he writes[3], "is mainly founded upon that community of origin, manners, institutions, and religion, which distinguishes the Christian Nations from those of the Mahommedan world. In respect to the mutual intercourse between the Christian and the Mahommedan Powers, the former have been sometimes content to take the Law from the Mahommedan, and in others to modify the International Law of Christendom in its application to them. Instances of the first may be found in the cases of the ransom of prisoners, the rights of ambassadors, and many others where the milder usages established amongst Christian Nations have not yet been adopted by the Mahommedan Powers. On some other points they are considered as entitled to a very relaxed application of the peculiar principles established by long usage amongst the States of Europe, holding an intimate and constant intercourse with one another."

Admission of the Porte into the Concert of European Nations.

§ 62. Such may have been a correct picture of the exceptional position which the Ottoman Porte occupied amongst the Powers of Europe during the early part of the reign of the Emperor Mahommed II. (1808—39). The Ottoman Empire was accordingly not represented by any Minister in the Congress of Vienna (anno 1815), nor was it included in the system of Public Law recognised by the Powers there assembled. But since the destruction of the Janissaries (17 June, 1826) the Ottoman Porte has steadily advanced in its practice towards the European platform of Public Law. It has not, it is true, made any formal communication to the European Powers on the sub-

[3] History of the Law of Nations. Part IV. § 21.

ject; but it may be considered to have substantially pledged itself to the acceptance of the International Law of Europe by subscribing, as one of the Parties to the General Treaty of Paris, (30 March, 1856 [4],) the clause of the Seventh Article, whereby the Sublime Porte is declared "to be admitted to a participation in the advantages of the Public Law of Europe and the System of Concert attached to it," since it is a cardinal principle of that System, that the rights and obligations of Nations are reciprocal. The Porte appears on that occasion not only to have acquiesced in the declaration of its admission into the European Family of Nations, but to have joined in applying to itself the principle involved in that declaration, as may be clearly deduced from the Fifteenth and Sixteenth Articles of the Treaty, whereby the Provisions of the Final Act of the Congress of Vienna concerning the navigation of rivers, which separate or traverse several States, are made applicable to the Danube and its mouths, and which disposition is declared to form part of the Public Law of Europe, and to be under the guaranty of all the Contracting Powers. The Porte had already abandoned its own traditions with regard to the precedence and reception of Foreign Ambassadors, and had in practice conformed itself to the rules established amongst the European Powers in regard to an uniform mode of reception, and an uniform scale of rank and precedence for Ambassadors and other Diplomatic Agents: it had already appealed in its negotiations with various Christian Powers, as for instance in the case of Greece in 1854, to International Rights and the Law of Nations as something independent of mere Compact, and upon which it took its stand in common with the

Treaty of Paris, 30 March, 1856.

[4] Martens, N. R. Gén. XV. p. 770.

Declaration of Maritime Law, 16 April, 1856.

Powers of Europe; it has further by subscribing the Declaration of Maritime Law at Paris, (16 April, 1856,) subsequently to its signature of the General Treaty, formally placed on record its assent to the milder practice, which the European Nations have agreed henceforth to adopt, in regard to the respective rights and duties of *Belligerent* and *Neutral* Powers.

It would thus appear, that the Ottoman Porte has for all practical purposes adopted the Common Law of Europe, as the rule of its intercourse with Non-Mahommedan Powers in matters not specially provided for by Treaty-engagements. Its International Relations under Treaty-engagements are and will probably continue to be extremely anomalous, owing to the broad line of demarcation which separates the manners and institutions of the Mahommedan world from those of Christendom. Some of these Treaty-engagements are strictly of a political character, establishing special obligations between Christian States and Individual Governments of the Ottoman Empire; others have in view the regulation and security of commercial intercourse between Ottoman and Christian Merchants, and are in form Capitulations between the Porte and Individual Christian Powers, being limited in their application to the subjects of those Powers whilst resident within the Ottoman Territory. These will require special notice in their proper place when the right of Treaty is discussed; it will be sufficient for the present to have alluded to them.

Constitution of the Ottoman Empire.

§ 63. The Ottoman Empire is *constitutionally* a Single State, composed of thirty-six[5] General Govern-

[5] This number is given in the Imperial Almanack (Salnamé) of 1854, and is adopted by Ubicini, La Turquie Actuelle, Introduction, p. 16.

ments, termed "Vilayets," which are subdivided into Provinces (livas or sandjaks); the Provinces are in their turn subdivided into Districts (Cazas or Centres of Justice), which are again subdivided into Cantons (nahiès) composed of Villages or Hamlets. Each Vilayet is administered by a Governor-General who bears the title of Vali. The Sandjaks or Livas are administered under the Vali by Governors, who are styled Mutessarifs. The Cazas are administered by Lieutenant-Governors (Kaimakams), and the Nahiès by Mayors (Mudirs)[6]. The division of the Empire into General Governments, which for the most part bear the name of the city, which is the seat of the Government, dates from the reign of Sultan Mahmoud II, who determined to efface the ancient provincial divisions of the Empire, as keeping up the memory of the old nationalities, and with that object subdivided the ancient provinces into Vilayets. The existing organization, however, saving certain reforms introduced into the Vilayet of the Danube by Midhat Pacha in 1864, dates from the reign of the Sultan Abdul Medjid, who succeeded to the throne in 1839. Of these Vilayets, which were thirty-six in number as organized by the Sultan Abdul Medjid, fifteen were in Europe, eighteen in Asia, and three in Africa. The Asiatic Vilayets retain in the present day their original territorial limits with the exception of portions of the Vilayets of Trebizonde, Erzeroum, and Van, which have been ceded to Russia under the Preliminary Peace of San Stefano of 3 March, 1878, and of which the cession has been confirmed by the

[6] The Mudirs are elected by the inhabitants of each Nahiè, subject to confirmation by the Vali. All the other functionaries are nominated by the Central Government Loi des Vilayets (1870). Samwer and Hopf., Traités 2me Série, Tom. III. p. 49.

subsequent Treaty of Berlin of the same year. On the other hand the European Vilayets have undergone great changes, and some of them have ceased to form part of the Ottoman Empire, for instance the Vilayets of Bogdan and Efflak (Moldavia and Walachia), and the Vilayet of Syrp (Servia). These three latter Vilayets enjoyed for some time a qualified independence under the Suzerainty of the Sultan, and whilst they were still recognised internationally as integral parts of the Ottoman Empire, they were in fact governed by Christian Princes, elected or hereditary as the case may have been, until their independence was definitively recognised by the Treaty of Berlin of 13 July, 1878. The condition of these Vilayets, being Christian dependencies of the Porte, was at all times distinct from that of the Mahommedan dependencies. By a strict application of its religious Law (The Coran, IX. 29) the Porte held each of its Christian dependencies by the obligation of paying tribute and obeying the General Law of the Empire. The Mahommedan dependencies, on the other hand, were bound to meet the Padichah's requisitions both in men and in money for purposes of war. The general rule has been modified in particular instances owing at one time to the weakness of the Porte itself, and to the successful resistance of the Valis, at other times to the interference of Foreign Powers taking the form of treaty-engagements, to which effect has been given by the Padichah's Firman or Edict. Of the three African Vilayets, to wit, Egypt, Tripoli, and Tunis, Egypt and Tunis are instances, in which Foreign Powers have intervened and procured for the Vali an hereditary tenure of his office of Governor-General, and an enlargement of his powers, whilst Tripoli has been reduced by force of

arms on the part of the Porte to the condition of an immediate Pachalik, like the Asiatic Vilayets, of which the Vali has only a precarious tenure.

§ 64. The Dependencies of the Porte on the Barbary Coast were formerly three in number, Algiers, Tunis, and Tripoli. Of these, Algiers was not originally a conquest of the Porte, but an acquisition of the Greek Renegade Kharaddin, better known as Barbarossa, who first introduced the practice of piracy in the Mediterranean and Levant Seas, and left it an established institution amongst the Mussulman tribes of the Barbary Coast. Barbarossa and his brothers were in fact *Condottieri of the Sea.* They had under the pretext of commercial enterprise established an armed fleet in the Mediterranean, and when Selim, the last Independent Prince of Algiers, was hard pressed by the united forces of the Spaniards and the Arab Tribes in alliance with the Emperor Charles V, Barbarossa brought his squadron to his aid, and upon his death succeeded to his Sovereignty. He was however sensible of his inability to struggle alone with success against the Powers of Christendom, and he accordingly hastened to place himself, as a vassal, at the feet of the Padichah of the Ottomans, who readily accepted his submission in that character, and conferred upon him the government of his newly acquired territory with the title of Bey. The subsequent career of Barbarossa fills a considerable page in the History of the Ottoman Empire. By the orders of the Emperor Soleiman I, he led his fleet against Tunis with a view to dethrone the Sultan Moulei Hasan, and to supplant his dynasty. His success was but temporary, and Tunis was restored to the ancient dynasty of Beni-Hafas by the united arms of the Emperor Charles V and the Knights of Malta. Tunis

The States on the Barbary Coast.

Algiers.

Tunis.

experienced subsequently great vicissitudes. The Spaniards under Don John of Austria regained possession of it for a short time in 1572, but in 1574 it passed into the hands of the Ottomans, and until very recently has been governed by a succession of Valis, nominated by the Porte, whose firmans are registered in the Chancery of the Divan at Constantinople.

Tripoli.

Tripoli had meantime been wrested by the Ottoman arms from the Knights of St. John of Jerusalem, and it was placed in like manner under the government of a Beylerbey. It was after this period that other Renegades from Christianity, taking advantage of the religious law of the Mussulman, which contemplates a permanent state of war to exist between the true Believer and the Unbeliever, capable of being suspended only by express treaty or by payment of tribute, gave so great a development to piratical enterprise in the ports of the three Barbary Powers, that they came to be considered in Europe as mere nests of pirates, which had usurped the character of political Bodies. So formidable indeed were the ravages of the Algerine Corsairs in the Seventeenth Century, and so inefficient was the Sovereignty of the Ottoman Porte to restrain them, that the Christian Powers of Europe found it expedient to conclude Conventions directly with the Barbary Governments in furtherance of treaties already existing with the Ottoman Porte. Thus Louis XIII of France concluded a treaty at Marseilles with the Pacha of Algiers (24 March, 1619)[7], whereby the latter bound himself to observe more faithfully than heretofore the commands of the Porte in regard to its Capitulations

Treaties with Algiers.

[7] Flassan, Histoire de la Diplomatie Française II. p. 329. Dumont, Traités, V. pt. II. p. 330.

with France. In the following year, Great Britain prepared to attack Algiers with a fleet under the command of Admiral Monson, but the projected hostilities were diverted by the payment of an indemnity from the Ottoman Porte. This result had been brought about through the instrumentality of Sir Thomas Roe, who had been despatched to Constantinople to open negociations directly with the Porte[8]. Special treaties were soon after concluded between England and the Regencies of Algiers and Tunis respectively, which received the confirmation of the Padichah. In the middle of the Seventeenth Century King Charles II of England despatched the Earl of Winchelsea, (anno 1660,) as Ambassador to the Governor of Algiers, who had very recently assumed the title of Dey, and concluded a Treaty of Commerce directly with the Dey, the main object of which was to secure British Merchant Vessels from piratical seizure. In the early part of the Eighteenth Century no English vessel of Commerce ventured to enter the Mediterranean from the Atlantic without calling at Gibraltar for a Mediterranean pass, which was signed by the Lords of the English Admiralty, and which under treaties with the Barbary States was necessary to exempt an English vessel from capture by the Algerine Sea Rovers. This practice however was put an end to by the Bombardment of Algiers in 1815 by a British fleet under Lord Exmouth, when the Dey agreed to abolish Christian Slavery, and to conform himself to the usages of European Civilisation. Piracy however was not entirely abandoned by the Algerines until France declared war against the Dey in 1830 with a view to

[8] Roe, Negociations with the Ottoman Porte, p. 35. 260. Von Hammer. Histoire de l'Empire Ottoman, IX. p. 30. Paris 1837.

avenge a national affront, and at the same time to deliver the Mediterranean Sea for ever from the scourge of piracy. France subsequently found herself called upon to secure her peaceable occupation of the city of Algiers and the adjoining coast by extending her conquests over the internal territory appurtenant to the Algerine State, and has ultimately reduced the whole of the Algerine territory under French dominion.

Early Treaties with the Sublime Porte.

§ 65. It appears from the Treaty concluded by Sir John Finch in 1675, between the Ottoman Porte and England[9], which recites and confirms the Articles of all the previous Treaties, that in the earliest Treaty with England, the Ottoman Porte had agreed "that the English Ambassadors may at their pleasure establish Consuls, resident in Aleppo, Alexandria, Tripoli of Syria, or Tunis, Algiers, Tripoli of Barbary, in Smyrna, the parts of Cairo, or any other parts of our dominions, and in like manner remove them or change and appoint others in their places, and none of our Ministers shall oppose or refuse to accept them;" and further, "the English Nation's Consul or Resident in any part of our dominions, being established by the Ambassador resident for the English Nation, our Minister shall have no power to imprison or examine them, or seal up their houses, nor to dismiss or displace them from their charge or office; but in case of any difference or suit with the Consul, there shall be made a Certificate to the Imperial Porte to the end that the Ambassador may protect or answer for them."

Although therefore stipulations are found in the Treaties concluded with the Barbary States respect-

[9] Hertslet's Treaties, II. p. 349.

ing the protection to be afforded to the Consuls of the European Powers, it must be borne in mind that the Consuls were not accredited to the Barbary Powers, as some writers on International Law assume, but exercised their functions under Treaty-engagements with the Porte itself. Molloy[10], in speaking of the Barbary Powers in the reign of Charles II, misled perhaps by the fact that the Earl of Winchelsea, the Ambassador of England to the Ottoman Porte, concluded a Treaty with the Dey of Algiers on his passage to Constantinople, partakes in the common error of describing them as nests of pirates which, notwithstanding this, "obtain the right of legation and having acquired the reputation of a Government, cannot now possibly be esteemed pirates, but enemies." He had previously described them more correctly as "Governments or States, upon which, although they acknowledged the supremacy of the Ottoman Porte, yet all the Power of it cannot impose more than their own wills voluntarily consent to." The Governments themselves, although *de jure* held during the pleasure of the Padichah, had become in practice, owing to the weakness of the Porte, Hereditary Regencies. The Regent however on his accession never omitted to claim the sanction of the Sultan, which with an appearance of demur was usually granted on the presentation to his Imperial Majesty of objects more or less valuable, qualified by the Porte as *tribute*, and by the Regent as a *free gift*. In cases of war the Regent furnished a contingent, the quality and amount of which he strove to regulate according to circumstances.

The Barbary States formerly Hereditary Regencies.

§ 66. The condition of Tunis has undergone in recent times considerable modification. Under a Firman

Anomalous position of Tunis.

[10] De Jure Maritimo, p. 38. § 4.

granted by the Porte on 23 Oct., 1871[11], to Mohammed Sadyk Pacha, Bey of Tunis, the province of Tunis within its ancient limits was confirmed to him as an hereditary government to descend to the senior member of his family, relieved from the tribute payable *ab antiquo*, but liable to furnish a military contingent in case that the Porte should be engaged in a foreign war. No change was to be made in the flag, and money was still to be struck as coin of the Empire. The right of concluding political treaties, of declaring war, making peace, and of assenting to any modification of the frontiers of the Province, was reserved to the Porte as amongst the sacred rights of Sovereignty, but outside those limits the Bey was authorised to maintain as heretofore treaty-relations with Foreign Powers. Accordingly we find a General Convention concluded on July 19, 1874[12], between the Queen of Great Britain and Mohammed Es Sadock Bey, as Lord of the Regency of Tunis, under which the privilege of Consular Jurisdiction was secured to British subjects. A distinction in respect of the exercise of such jurisdiction is observable as between the province of Tripoli and the Regency of Tunis, inasmuch as in the former province the Consular Jurisdiction is exercised in conformity with the capitulations applicable to the other European and Asiatic Provinces of the Ottoman Empire, in pursuance of a Protocol signed at Constantinople on 24 February, 1873, to which Great Britain, France, Italy, and the Porte, were parties, whereas in the Regency of Tunis the Consular Jurisdiction is exercised in accordance with Conventions between the

[11] Législation Ottomane, par Démétrius Nicolaides. 2me Partie. Constantinople, 1874, p. 147.

[12] N. Recueil Général des Traités, par Samwer et Hopf. 2me Série. Tom. II. p. 479.

Bey of Tunis himself and the respective European Powers.

A somewhat anomalous change has come over this dependency of the Porte, in pursuance of a Treaty of friendship and good neighbourhood signed at Casr-Said on 12 May, 1881, between the Government of the French Republic and His Highness the Bey of Tunis. The two high contracting parties being desirous to prevent the renewal of the disorders, which had recently caused trouble on the frontier of the two States and on the Tunisian Coast, agreed to conclude a Convention for that object in the interest of both the High Contracting Parties. By Article I, it was agreed to confirm all the existing Treaties between the French Republic and the Bey of Tunis. Under Article II, the Bey of Tunis consented that the French Military Authorities should occupy the points which they might deem to be necessary to assure the re-establishment of order and the security of the Frontier and of the Coast. This occupation is to cease, when the French and Tunisian authorities shall recognise by a common accord that the local administration is in a state to guarantee the maintenance of order. By Article III, the Government of the French Republic has engaged itself to afford a constant support to His Highness the Bey of Tunis against every danger, which may menace his person or his dynasty, and which may compromise the tranquillity of his States. By Article IV, the Government of the French Republic has guaranteed the execution of the Treaties actually existing between the Government of the Regency and the various European Powers. By Article V, the Government of the French Republic is to be represented near His Highness the Bey of Tunis by a resident Minister, who shall watch

over the execution of the Treaty, and who shall be the intermediary of the relations of the French Government with the Tunisian authorities in all matters concerning the two countries. By Article VI, the Diplomatic and Consular Agents of France in foreign countries are to be charged with the protection of Tunisian interests and of the Nationals of the Regency. In return, the Bey of Tunis has engaged not to conclude any Act of an international character without having made it known to the Government of the French Republic, and having previously come to an understanding with it. The four concluding Articles of the Treaty have reference to matters of finance—a war indemnity to be levied on the tribes in revolt, a prohibition against the introduction of contraband of war into the Algerian territory, and the ratification of the Treaty itself, to which are affixed the signatures of Mohammed Es Sadock Bey on the one part, and of General Bréart, the Representative of France, on the other part [13].

It does not appear from any published document that the assent of the Suzerain Power has been given to the French Protectorate, on the contrary, the Porte appears to have protested[14] against this Treaty (12 June, 1881), and has declined to recognise its validity on the occasion of the French Consul-General in Tripoli claiming the right of protecting natives of Tunis within that Vilayet of the Porte. Further, the French Government has asserted a similar right of protection over Tunisian subjects settled in Egypt, which is still a dependency of the Porte, notwith-

[13] Nouveau Recueil Général des Traites, par Samwer et Hopf. 2me Série. Tom. VI. p. 507.

[14] Despatch from the Porte to the Ottoman Ambassador in London. Das Staats-Archiv. 1881, p. 11.

standing the Sultan, in his Firman of 23 Oct., 1871, has declared formally all Tunisian subjects to be his subjects. Mohammed Es Sadock Bey has subsequently to his acceptance of a French Protectorate, abdicated the Regency of Tunis, and his next brother, Sidi-Ali, pursuant to the order of succession in his family, established under the Firman already mentioned, has succeeded to the Regency on 28 Oct., 1882.

The Protectorate, which France has undertaken under the provisions of the Treaty of 12 May, 1881, and which she claims to exercise over Tunisians in foreign countries, deserves some remarks, as the exercise of such a Protectorate without a previous recognition of the Treaty Right by the Suzerain Powers and by the Powers within whose territory it is sought to be exercised, may be regarded as a novelty. The Protectorate which Russia claimed to exercise over Ottoman subjects within the Danubian Principalities, was in virtue of Treaties with the Ottoman Porte, and was only of concern to the Ottoman Porte itself, the exercise of whose Sovereignty within its own territorial dependencies was liable to be affected by it. But the Protectorate, which the French Republic claims to exercise over Tunisians in foreign countries, in pursuance of Article VI of the Treaty of Casr-Said, concerns foreign countries, inasmuch as it may conflict with Treaty Rights conceded by those countries to the Suzerain Power. It has, as regards foreign countries, some analogy to the Protectorate which the King of Great Britain and Ireland exercised in foreign countries, over the natives of the Ionian Islands, before the Seven Islands were united to the Kingdom of Greece in 1863. But before the King of Great Britain and Ireland advanced any claim to exercise a Protectorate over Ionian subjects in foreign

countries, the provisions of the Conventions between Great Britain and her three Allies, Russia, Austria, and Prussia, who had a Treaty Right of joint disposal over the most important of the Seven Islands, had received a general recognition from the European Powers at the Congress of Vienna. Further, the Ottoman Porte renounced its sovereign rights over the Islands and their dependencies in favour of Great Britain as the Sovereign Protector by a Special Act (24 April, 1819), and by that Act recognised the inhabitants of the said Isles as subjects of the Protecting Power, and as entitled within the Turkish Empire to the benefits secured to British subjects under the ancient Capitulations of Great Britain with the Ottoman Porte.

§ 67. The condition of Egypt, which is in theory a Vilayet of the Ottoman Empire, but is practically a vassal State, is the result of an International Compact, as, although it has been in form settled by a Firman under the Cypher (Tugra) of the Padichah of the Ottomans addressed to Mehemet Ali Pacha on Feb. 12, 1841, that Settlement was the result of an agreement between the Porte and four of the Great European Powers, and gave effect to a Treaty concluded between them and the Porte on 15 July, 1840. Further it was approved by those Powers [15] before it was transmitted to Mehemet Ali. The history of Mehemet Ali, the founder of the present Egyptian dynasty, is singular. He was born at Kavala in Roumelia in 1769, and came to Egypt in 1803, in command of some Albanian irregular troops in attendance upon the Pacha of the day. He remained in Egypt upon the Pacha's return to Europe, and subsequently took part with his troops in Khosrew

[15] British and Foreign State Papers, vol. lix. p. 577.

Pacha's campaign against the Mamelukes. After the disastrous battle of Damanhur near Cairo, he was deprived by Khosrew Pacha of his command, whereupon he joined the Mamelukes, and putting himself at their head drove Khosrew Pacha back to Damietta. He shortly afterwards (1805) obtained from the Porte the investiture of the Pachalik of Egypt. The political power, however, of the Mamelukes still survived, although their military strength had been broken by General Bonaparte at the battle of the Pyramids (21 July, 1798). The division of Egypt into twenty-four Beyliks dates from the Conquest of Egypt by the Turks in 1517, when the Sultan Selim I, having vanquished and dethroned the last Mameluke Prince of the Circassian dynasty, converted Egypt into a Turkish Pachalik, and surrounded the Pacha with a Mameluke Council consisting of the Governors of the twenty-four Beyliks. The Mameluke Beys, who were intended to act as a salutary check upon the Sultan's Representative, gradually became the Masters of Egypt, and so remained, until they were annihilated on 1 March, 1811, by the craft and treachery of Mehemet Ali. It was not until after that event that it became possible for the Pacha of Egypt to raise the Standard of Independence against the Porte. Meanwhile, during the Greek war of Independence, Mehemet Ali sent troops to the assistance of the Porte, and the Egyptian fleet under the command of his adopted son Ibrahim Pacha came into collision with the British, Russian, and French fleets off Navarino on 20 October, 1827. Mehemet Ali was rewarded by the Porte at the close of that war with the government of the Island of Candia. Taking advantage of the weakness of the Porte Mehemet Ali determined in 1831 to make an effort

to obtain complete independence. His son, Ibrahim Pacha, invaded Syria, and overran Asia Minor, defeating Reschid Pacha at Konieh, and he ultimately threatened Constantinople itself, when the intervention of a Russian Fleet, which cast anchor in the Bosphorus on 20 Feb., 1833, alone saved the throne of the Padichah. The Convention of Kutaya (5 May, 1833) put an end to hostilities, and gave to Mehemet Ali the whole of Syria and the Pachalik of Adana, subject however to the Suzerainty of the Porte. In the war, which subsequently ensued, the victories of Mehemet Ali threatened again to impair the integrity of the Ottoman Empire and the independence of the Ottoman Sultan's throne, which circumstance led to the intervention of Great Britain, Austria, Prussia, and Russia in the interests of the peace of Europe.

These Powers accordingly became parties to a Quadruple Treaty with the Porte (Treaty of London, 15 July, 1840), under which they agreed to enforce against Mehemet Ali the provisions of an arrangement settled between themselves and the Porte, the details of which were specified in a separate Act annexed to the Treaty. Fortune no longer favoured the arms of Mehemet Ali, and Ibrahim Pacha was compelled to evacuate Syria. Mehemet Ali had thereupon to renounce possession of Candia and of Syria and of the Hedjaz which he had acquired by the Treaty of Kutaya, and to content himself with the hereditary Pachalik of Egypt, subject to the payment of an annual tribute of 80,000 purses. France stood aloof from any direct participation in this Treaty, but seconded the result by her moral influence at Alexandria[16]. Accordingly, by a Hatti Cherif of 12 Feb., 1841, confirmed and

[16] Memorandum of M. Thiers, Minister of Foreign Affairs (5 Oct. 1840). Martens, N. R. Général, I. p. 183.

enlarged by an Imperial Firman of 1 June, 1841, Mehemet Ali was appointed Vali, or Governor-General of Egypt with a right of succession secured to the eldest born of his male children and grandchildren, subject, however, to the nomination of the Padichah. This order of succession was maintained in the case of his eldest son Ibrahim Pacha, who was nominated Vali in January, 1848, before his father's death, in consequence of Mehemet Ali's incapacity from old age, Mehemet Ali having at that time entered his eightieth year. Ibrahim Pacha predeceased his aged father and was succeeded in November, 1848, by his nephew Abbas Pacha, the son of Toussoun Pacha, who was the second son of Mehemet Ali. Abbas Pacha bears the reputation of having been a vicious and rapacious ruler, and he was strangled by his own Kawasses in his palace at Benha on the Damietta branch of the Nile. He had, however, the merit of dying without debts. Said Pacha, the fourth Hereditary Vali of Egypt, was the sixth son of Mehemet Ali, although he was junior in point of age to his nephew Abbas Pacha. He was an enlightened and capable ruler, and reigned nearly twenty years, during which Egypt made great progress, although her expenditure soon began to be in excess of her revenue. He contracted the first foreign loan, and granted in 1856, subject to the confirmation of the Porte, a Charter for piercing the Isthmus of Suez to the Universal Company, over which M. Ferdinand de Lesseps presides. He did not live to see the Suez Canal completed, but he laid down the railways from Alexandria to Cairo, and from Cairo to Suez. Said Pacha died on 10 January, 1863, leaving a heavy burden of debt to his successor. He was succeeded, in accordance with the Firman of 1841, by Ismail

Pacha, the second son of Ibrahim Pacha and the senior member of the family of Mehemet Ali, the founder of the dynasty. In the third year after his succession to the government of Egypt Ismail Pacha obtained from the Padichah a Firman bearing date 2 May, 1866, by which a new order of succession was established in favour of his direct heirs male in the order of primogeniture. This Firman recognised the complete autonomy of the Governor-General of Egypt in all internal affairs, and authorised him to contract foreign loans and to enter into Commercial treaties with the agents of Foreign Powers, provided they did not conflict with the political treaties of the Porte.

By a previous Firman of May, 1865[16], the ports of Massawah and of Souakim together with the Province of Taka had been granted to Ismail Pacha on the twofold condition of paying to the Government of Djeddah an annual contribution of 7,500 purses, and of suppressing the Slave trade. The Kaimakamates of Souakim and of Massawah were declared by the Firman of 27 May, 1866, to be hereditary, and to pass with the Government of Egypt to the heirs male of Ismail Pacha. Souakim is on an island in the Red Sea, and was formerly an important depot for the Slave trade. The export trade of the Soudan passes through it, whilst Massawah is a neighbouring island, and is the chief seaport for the produce of Abyssinia. Further, by this Firman the annual tribute payable by Egypt was increased from 80,000 purses to 150,000 purses, and further provided for the case of the Vali dying without direct heirs male, in which case the inheritance was to pass to his eldest brother, and in default of a brother surviving him, to the eldest son of his eldest brother, and so on.

[16] British and Foreign State Papers, vol. lxvii. p. 181.

To pass over other Imperial Firmans of minor importance, it will suffice to notice the contents of a Firman of June 8, 1867, addressed "to My illustrious Vizier Ismail Pacha, who now holds the rank of Grand Vizier with the title of 'Khidev' of Egypt." By this Firman the Khedive obtained the confirmation of his autonomy in all matters of internal government, and was authorised to frame such regulations as might seem to him necessary in the form of a Special Tanzimat for Egypt[17]. Further, he obtained full powers in all matters relating to the police, postal, and transit services, and as regards Customs duties was authorised to enter into special arrangements with foreign agents, provided that such arrangements should not have any political signification or purport. A further Firman was granted to Ismail Pacha, bearing date June 8, 1873[18], to consolidate and as it were to complete the previous firmans as to the succession, and further to provide for a Regency in case the nearest male heir should be under eighteen years of age. This Firman gave the Khedive permission to maintain an unlimited number of Imperial troops, but forbade him to construct ironclad ships of war without the permission of the Sultan. Further, it authorised him to contract without leave in the name of the Egyptian Government any foreign loan which he might think necessary: further, "to renew and to contract (without interfering with the political treaties of the Sublime Porte) conventions with the agents

[17] Hitherto the Tanzimat of 3 Nov., 1839, which had been published at Gul-Hane, and was the general law of the Empire, had been in force in Egypt.

[18] Législation Ottomane. Deuxième Partie. Droit Public Intérieur, p. 140. Constantinople, 1874. Samwer and Hopf. Traités, N. R. Général. Tom. XVIII. p. 629. Parliamentary Paper, C. 2395. Egypt, No. 4 (1879).

of Foreign Countries for Customs and Trade, and for all relations which concern foreigners, and all the affairs of the country, internal or otherwise, with the object of developing commerce and industry, and to arrange the police for foreigners as well as their position, and all their relations with the Government and the populations." In pursuance with the powers conferred by this Firman a novel international factor was introduced into Egypt in 1875 by Ismail Pacha after the details had been for seven years a subject of discussion with the various Christian Powers of Europe, namely, a system of mixed tribunals of Justice in substitution for the Consular Tribunals. The initiation of these mixed tribunals was due to the Khedive's Minister Nubar Pacha, an Armenian Christian, who was supported by Cherif Pacha and Riaz Pacha, also Ministers of the Khedive, and who acted in concert with Aali Pacha, the Grand Vizier of the Sultan. By the institution of these mixed tribunals the administration of justice was made independent of the Executive Government of Egypt, as well as of the Foreign Consuls. To examine the constitution of these Tribunals and to suggest improvements in their procedure would be here out of place, but one defect in them deserves to be noticed, for it was fraught with serious consequences to their founder. It was inevitable that questions should be brought before the mixed tribunals, in which the Khedive would be himself a party, and no provision was made to regulate the procedure of the tribunals in such cases, so as to maintain a *formal* respect for the Sovereignty of the Khedive, whilst *substantial* justice was assured to the subject who sued his Sovereign. For instance, in England no subject can bring a civil action against the Sovereign in the same form in which he can sue

a subject of the Crown, he must proceed by way of Petition of Right instead of by Writ of the Crown, but this exceptional method of proceeding does not in any way interfere with the substantial administration of justice, whilst it preserves respect for the Sovereign Power. In Egypt, on the contrary, the mixed tribunals had no other resource in cases where the Khedive was a party than to assert a power on their part superior to that of the Sovereign of the State, and so a conflict arose between the Courts and the Executive, in which as the European Powers supported the Courts, the prestige of the Sovereign Power was lowered. In fact, it has been said of Ismail Pacha and of the judicial reforms which he introduced, that he was destroyed by "his own offspring." Notwithstanding the shortcomings, however, which of necessity were to be expected in the working of these novel tribunals, there can be no doubt that much good has resulted from them. They were, it must be admitted, a compromise between the privileged jurisdiction of the foreign consuls and the corruption of the native Courts, but no better proof can be given of the value of the mixed tribunals than the efforts, which the native population are in the habit of making, to have their cases heard before them in preference to the native Courts.

Unfortunately, however, for the Khedive, his haste to realise his enthusiastic schemes for placing Egypt in the first rank of civilised nations led him into the grave financial error of contracting an enormous debt, amounting in 1878 to more than ninety millions of pounds sterling, which caused the general exasperation of an over-taxed people, an unpaid army, and starving officials; and in June, 1879, the Sultan was induced to issue a Hatti Cherif, deposing the Khedive Ismail and substituting his eldest son Tewfik Pacha in

his place. Ismail, upon the advice of the British and French Consuls-General, submitted to the Sultan's Order and abdicated the Khediviate, and by an Imperial Firman of 2 August, 1879[19], his son Tewfik Pacha was called to the Khediviate with the high rank of "Tédaret Effectif." This Firman, however, as contrasted with that of 1873, imposed certain limitations on the autonomy of the Khedive, inasmuch as Tewfik Pacha is forbidden by it to contract any foreign loans save with the object of regulating the existing Financial situation of Egypt, and with the full assent of its existing creditors. He is also required to communicate to the Porte any commercial treaties which he may conclude with the agents of Foreign Powers before he promulgates them, and by a note addressed to the British Ambassador at Constantinople on 29 July, 1879[20], the Porte has explained this provision of the Firman, that it is not intended to require the Khedive to obtain the sanction of the Porte to any such treaty before practical effect is given to it, but that it reserves to the Porte the right of refusing to recognise it, if it should be inconsistent with any political treaty of the Porte's. Further, the money of Egypt is to be coined in the name of the Sultan; the army of the Khedive is not to exceed 18,000 men, except if the Porte should be engaged in war. The flag and the uniform of the troops are to be identical with those of the Porte, and the Khedive is not to construct any ironclad vessel of war without the express authorisation of the Porte. The Khedive is further prohibited from alienating

[19] Samwer and Hopf., Traités, 2me Série. Tom. VI. p. 508.

[20] An official translation of the firman of Aug. 2 had been communicated to the British and French Ambassadors at Constantinople before it was transmitted to Tewfik Pacha, together with a declaration explaining the restrictions in it.

to others, in whole or in part, the privileges which have been accorded to Egypt and entrusted to him as an emanation of the prerogatives inherent in the Sovereign Power, or any portion of territory. Of this latter provision, the Ambassadors of France and of England received a Joint Note of explanation to be transmitted to their respective Governments.

Principality of Samos.

§ 68. The Principality of Samos occupies an anomalous position amongst the tributaries of the Ottoman Empire. The island of Samos, under the territorial system of the Sultan Mahmoud II, was a Sandjak in the Vilayet of Djizair or the Isles, of which the Vali or Governor-General resided at Rhodes. The Samians had cast in their lot with the inhabitants of the Morea in 1821 in their struggle for Independence against the Porte, and during the Conferences of the Three Powers, which ultimately guaranteed the independence of Greece, the President of the Provisional Hellenic State, Count Capo d'Istrias, had interceded in vain to obtain a maritime frontier for Greece, which would have included Samos amongst the Hellenic Islands. The exclusion of Samos from the limits of the new Kingdom of Greece was one of the difficulties which prevented Prince Leopold of Saxe-Coburg definitively accepting the Hellenic throne. Notwithstanding the adverse decision of the Three Powers, Samos continued her struggle for independence, and it was not until 1835 that she made her submission to the Porte in accordance with the provisions of a Firman issued by the Sultan as far back as 10 December, 1832, which had been communicated to France, Great Britain, and Russia[21]. The Three Powers had previously put on record their

[21] Baron de Testa. Recueil des Traités de la Porte Ottomane. Tom. II. p. 399.

joint resolution in a Protocol of 20 Feb. 1830 to assure to the inhabitants of the Isle of Samos their protection against any act of oppression on the part of the Porte. The result was a concession[22] to the Samians on the part of the Sultan of the privilege of being governed by a President and Council, the President to be nominated by the Sultan and to be of the same religion as the Samians, and also to have the title of Prince ; the Council to be chosen, according to custom, from the Notables of the Island. Under the Firman of the Sultan, the Samians have their own mercantile flag, and the Prince has a veto on the deliberations of the Council with regard to all external matters. He has also the control of the police of the island, and the option of granting to foreigners permission to reside there. No armed troops are allowed within the island, and the island pays to the Porte an annual tribute of 400,000 piastres. The Metropolitan Bishop of Samos is nominated by the Greek Patriarch of Constantinople. He is also Bishop of Ikaria, and is a member of the Greek Orthodox Church, to which almost the entire population of the island belongs. It was with great reluctance and under strong constraint imposed upon them by the Three Powers that the Samians accepted in 1835 these conditions, in accordance with which the island enjoys an administrative independence in the present day.

Principality of Bulgaria.

§ 69. The Hatti Cherif of Gulkhanè, promulgated by the Sultan Abdul Medjid on 3 November, 1839, upon the advice of Redchid Pacha, his Grand Vizier, decreed the principle of civil equality amongst all the subjects of the Ottoman Empire. The reverses, which the armies of the Padichah had experienced in several

[22] Législation Ottomane, par Aristarchi Bey. 2me Partie, p. 147. Constantinople, 1874.

campaigns against the forces of Mehemet Ali, had previously suggested to Sultan Mahmoud II the necessity of attaching to his throne the Christian populations of his Empire, and he was also desirous to prevent the emigration of his Christian subjects from his dominions into the new Hellenic Kingdom. These two motives will serve to explain the origin of the change in the policy of the Porte, which was initiated by Mahmoud II and continued by his successor, Abdul Medjid. The Christian populations in European Turkey were not confined to the Christian Dependencies of the Porte, to wit, Servia and the two Danubian Principalities, but they constituted the bulk of the inhabitants of the ancient Bulgaria, which had been divided by Mahmoud II into three Vilayets, to wit, that of the Danube, Niche, and Sofia, as well as the ancient Roumelia divided into four Vilayets, to wit, Scodra (Scutari in Albania), Yania (Yanina), Monastir, and Selanik (Salonica). Further, a considerable Christian population of Servian origin dwelt alongside of and outnumbered the Mussulman population in Bosnia and Herzegovina. It is necessary to be familiar with the peculiar distribution of the Christian populations in the European provinces of the Ottoman Empire, in order to appreciate the labours of the Congress of Berlin, which lasted from June 13 to July 13, 1878, and which has accomplished for Eastern Europe a settlement hardly less important than that which the Congress of Vienna achieved in 1815 for Western Europe. It should also be borne in mind that the mass of the Christian populations in the Vilayets above mentioned are of Slavic not of Greek race, and whilst the ancient aristocracy of Bulgaria and of Roumelia has disappeared, the Bosniak Beys have maintained their ascendency over the

Christians in Bosnia and Herzegovina, and have prevented due effect being given to the Hatti Cherif of Gulkhanè already mentioned, and to the subsequent Hatti-Houmaioun of 1856, issued by the Sultan after the Peace of Paris of 30 March, 1856. It was the sad condition of the Christians in Bosnia and Herzegovina, notwithstanding that their serfage under the Bosniak Beys had been abolished by the Porte in 1851, that gave rise to the troubles which led to the Conferences of the European Powers at Constantinople in 1877. It was attempted at those Conferences to maintain the integrity of the Ottoman Empire, but the Powers were unable to arrive at a common understanding, and a war between Russia and the Porte ensued, in which the Christian Principalities of the Porte threw in their lot with Russia against the Suzerain Power, and succeeded in establishing their independence as explained more fully in the next following chapter.

To pass by the conditions under which the Porte has agreed to recognise the independence of Servia, of Roumania, and of Montenegro, which accordingly are no longer under the dominion of the Ottoman Porte, important modifications have been made by the Treaty of Berlin in the relations of Bulgaria and of Roumelia to the Suzerain Power. By Article I of that Treaty, Bulgaria is constituted an autonomous principality, paying tribute to the Porte, under a Christian government, and with a national militia. The Prince of Bulgaria is to be openly elected by the population, and his election is to be confirmed by the Porte with the assent of the Signatory Powers. No member of the reigning Dynasties of the Great European Powers can be elected Prince of Bulgaria. A difference of religious

belief cannot be objected to any person as a motive of exclusion or of incapacity in what regards the enjoyment of civil or political rights within the principality. Perfect liberty of religious worship is assured to Bulgarian subjects as well as to strangers. All foreign treaties of commerce and of navigation, as well as all conventions between Foreign Powers and the Porte, are maintained in the Principality of Bulgaria, and no change can be made in them without the consent of the Power interested. The immunities of the subjects of foreign powers, as well as the privileged jurisdiction of their consular tribunals, are maintained until they shall be modified by consent. The amount of tribute payable to the Suzerain Power is to be settled by an accord amongst the Signatory Powers, as well as the portion of the Public debt of the Empire to be charged upon the Principality. No Ottoman troops are to be quartered in the Principality, and all the ancient fortresses are to be destroyed at the expense of the Principality. Bulgarian subjects who shall travel or reside in other parts of the Ottoman Empire shall be subject to Ottoman law. In pursuance of Article III of the same Treaty of Berlin, Prince Alexander Joseph of the Grand Ducal Family of Hesse, and first cousin of the reigning Grand Duke of Hesse, was unanimously elected Prince of Bulgaria on 29 April, 1879 by a Constituent Assembly. He assumed the reins of government on 28 June, 1879, under the title of Prince Alexander I.

§ 70. By Article XIII of the same treaty of Berlin, a province has been formed to the South of the Balkans, under the name of Eastern Roumelia. This province is under the direct political and military authority of his Imperial Majesty the Sultan,

under the conditions of administrative autonomy, with a Christian Governor-General, who is to be nominated by the Porte for a period of five years with the assent of the Signatory Powers. The Porte is to have a right of garrison in the fortresses, but no troops are to be quartered on the inhabitants, and internal order is to be maintained by a native body of armed police. The Governor-General may invoke the aid of Ottoman troops to maintain the internal or external security of the Province, but notice of any necessity which justifies such aid shall be given to the Signatory Powers. Further, an European Commission is to organize, in accord with the Ottoman Porte, an administrative constitution for Eastern Roumelia. All the Treaties and Conventions concluded between the Porte and Foreign Powers apply to Eastern Roumelia. Foreigners are to have the same privileges and immunities as in other parts of the Ottoman Empire, and religious liberty is assured to every form of worship. It will be seen . that the international checks upon the exercise of the Porte's Sovereignty over Eastern Roumelia are very slight. The Signatory Powers have a consultative voice in the appointment of a Governor-General, who must be a Christian, and the Sultan has admitted an obligation on his part towards the European Powers of maintaining perfect religious liberty within the limits of the Province of Eastern Roumelia, as specified in Article XIV of the Treaty of Berlin.

The Lebanon.

§ 71. The condition of the Lebanon has been one of almost continuous civil warfare between the Maronites and the Druses, since the evacuation of Syria by Mehemet Ali, which took place in 1841 [23], in con-

[23] British and Foreign State Papers, vol. l. p. 6.

sequence of the intervention of the Four Christian Powers, pursuant to the Treaty of London of 1840. At last, in 1860, the Five Christian Powers, France having again joined the European Concert, determined to co-operate with the Porte in effecting a Pacification of Syria, and in pursuance of a Convention signed at Paris, Sept. 5, 1860, a body of European troops in conjunction with a fleet by sea accomplished the object of the Convention, and in the following year a Conference of the Five Powers in conjunction with Turkey was held at Constantinople. In pursuance of a Protocol adopted by this Conference, the Porte issued an Organic "Règlement pour l'Administration du Liban," dated 9 June, 1861 [24], under which it was arranged that the Lebanon henceforth should be administered by a Christian Governor-General, nominated by the Porte under a previous understanding with the Christian Powers. This Règlement was in fact the work of an International Commission, and after various amendments had been introduced by the Conference, it was finally accepted by the Representatives of the Christian Powers and promulgated by His Imperial Majesty the Sultan under the form of a Firman. In accordance with this Protocol the Governor-General of the Lebanon was to hold office for three years. At the end, however, of the first three years a Conference of the Six Powers was assembled at Constantinople, and agreed to a further confirmation of the then Governor-General in his post for five years. A still further change was made in the tenure of the Governor-General's office, at a Conference held

[24] British and Foreign State Papers, vol. li. p. 288. Martens, Traités, N. R. G. Tom. XVII. part ii. p. 107.

at Kanlidja on 15 July, 1868 [25], when it was agreed that the duration of the Mandate of Franco Nasri Pacha should not be less than ten years. Subsequently, in consequence of the death of Franco Nasri Pacha, a Conference of the Powers was held at Constantinople, 22 April, 1873 [26], and the Five Christian Powers recorded their assent by anticipation to the nomination of Rustem Pacha for a period of ten years. The term of this last-named Wali expired in the present year, and Wasa Effendi, an Albanian Catholic, has been proposed by the Porte and has been accepted by the Five Powers at a Conference held in Constantinople. The Governor-General of the Lebanon, under the terms of the Règlement Organique of 1861, has plenary Administrative Power, nominates the executive and judicial officers, collects the revenue, which is fixed at 3500 purses, out of which the expenses of the administration are to be defrayed, and the balance only, if any, is to be remitted to the Porte. In fact, the Règlement Organique, to which are subscribed the names of the representatives of all the Six Powers, is a Charter of the Liberties of the Mountain.

Bosnia and Herzegovina.

§ 72. The conditions of the Provinces of Bosnia and Herzegovina are somewhat anomalous, as they are under the provisions of the Treaty of Berlin, to be occupied and administered by Austria-Hungary, and Austria-Hungary has reserved to herself the right of garrison and of free military communication throughout the Sandjak of Novibazar, which extends between Servia and Montenegro. The administration of this Sandjak in other respects is to be exercised by the Porte. The Peace of San Stefano had provided that

[25] British and Foreign State Papers, vol. lxi. p. 1029. Martens, Traités, N. R. G. XVIII. p. 233.

[26] State Papers, vol. lxiii. p. 227.

the European proposals communicated to the Ottoman Porte in regard to these Provinces in the First Sitting of the Conference of Constantinople, 1877, should be at once introduced, subject to such modifications as should be agreed upon between Russia, Austria-Hungary, and the Porte. Those proposals involved an administrative autonomy of the widest kind, under a Governor-General named by the Porte, for five years, with the assent of the European Powers, the autonomy itself to be under the control of an International Commission. This proposed arrangement fell to the ground with other contemplated arrangements submitted to the Powers represented in those Conferences. Meanwhile, on the breaking out of war between Russia and the Porte, in which Servia and Roumania took part, Austria-Hungary, with a view to prevent an internecine conflict between the Christian and Mussulman population of Bosnia and Herzegovina, effected a military occupation of the two Provinces on her own responsibility. The future conditions of that occupation are expressly reserved by Article XXV of the Treaty of Berlin to a common understanding between Austria-Hungary and the Porte.

Cyprus.

§ 73. The International Status of the Island of Cyprus bears some analogy to that of Bosnia and Herzegovina, with the exception that the Status of the latter Provinces has been formally recognised in an Act of the Congress of Berlin, to which the Porte was a party, whereas that of Cyprus is founded on a Treaty of Alliance between Great Britain and the Porte. The preliminaries of the Peace, which the successful campaign of 1877 had enabled Russia to impose upon the Porte at San Stefano, under which Ardahan, Kars, Batoum, Bayazid, and the territory

as far as Saganlough (Art. XIX), were ceded to Russia as an equivalent for a portion of the indemnity claimed by Russia for the expenses of the war, were considered by Great Britain to give to Russia not merely the most important Eastern port of the Black Sea and the possession of the Frontier fortresses, but also the control over the transit of trade from Trebisonde to Persia, which would be highly detrimental to the Turks. Russia, in a Memorandum signed at London 30 May, 1878, agreed to renounce her claim to Bayazid and the Valley of Alashkert, along which the great caravan route of commerce runs between Trebisonde and Persia. She did not however assent to reduce in other respects the proposed extension of her frontier, and Great Britain did not hesitate to avow to Russia that she foresaw in the future great danger to the tranquillity of the populations of Turkey in Asia as the result of that extension, and further, that she reserved to herself the right to take such measures as she might think necessary to protect her own interests and her own influence over those populations. The result was that on 4 June, 1878, Great Britain concluded an Alliance with the Porte of the following tenor :—

"If Batoum, Ardahan, Kars, or any of them shall be retained by Russia, and if any attempt shall be made at any future time by Russia to take possession of any further territories of his Imperial Majesty the Sultan in Asia, as fixed by the definitive Treaty of Peace, England engages to join His Imperial Majesty the Sultan in defending them by force of arms.

"In return, His Imperial Majesty the Sultan promises to England to introduce necessary reforms, to be agreed upon later between the two Powers, into the Government and for the protection of the Chris-

tian and other subjects of the Porte in these territories; and in order to enable England to make necessary provision for executing her engagement, His Imperial Majesty the Sultan further consents to assign the Island of Cyprus to be occupied and administered by England[27]."

The Congress of Berlin commenced its deliberations on 13 June, 1878. Its main object was to settle a definitive Peace between the Porte and Russia, and the Asiatic frontier between the two countries was the subject of discussion on 6 July, 1878. Russia on this occasion maintained her frontier line in accordance with the Memorandum of 30 May, 1878, but made one further concession in announcing her intention to declare Batoum to be a Free-port of Commerce. The result was that Batoum, Ardahan, and Kars were retained by Russia, and the contingency was not realised under which the Treaty of Alliance between England and the Porte would have been at an end, inasmuch as an Annexe had been appended to the Treaty of 4 June, pending the Session of the Congress, of this tenor:—

"Art. VI. If Russia restores to Turkey Kars and the other conquests made by her in Armenia during the last war, the Island of Cyprus will be evacuated by England, and the Convention of 4 June, 1878, will be at an end."

It appears from a Dispatch from the Marquis of Salisbury to Sir A. H. Layard, the British Ambassador at Constantinople, of May 30, 1878[28], that it was not the intention of Great Britain to ask the

[27] N. R. Général des Traités. Samwer and Hopf. 2me Série. Tom. III. p. 272.

[28] Turkey, No. 36 (1878). Correspondence respecting the convention between Great Britain and Turkey of June 4, 1878. Parliamentary Papers, 1878.

Sultan by the above Treaty to alienate territory from his Sovereignty, or to diminish the receipts which pass into his Treasury. They therefore proposed that while the administration and occupation of the Island shall be assigned to the Queen of Great Britain, the territory shall still continue to be part of the Ottoman Empire, and that the excess of revenue over the expenditure, whatever it might at that time be, shall be paid annually by the British Government into the Treasury of the Sultan. Accordingly the third Article of the Annexe provides that England shall pay to the Porte whatever is the present excess of revenue over expenditure in the island; this excess to be calculated upon and determined by the average of the last five years, as stated to be 22,936 purses, to be duly verified hereafter and to the exclusion of the produce of State or Crown lands let or sold during that period.

The scope of this Convention was further explained in a letter from the Marquis of Salisbury to M. Waddington, the French Minister of Foreign Affairs, of 7 July, 1878, in which his Lordship says, "How long the occupation will continue it is impossible to foresee, but Her Majesty's Government are not without hope that Russian Statesmen will in due time satisfy themselves, that the territory they have acquired is costly and unproductive, will recognise the futility of any plans which in any quarters may have been formed for making it a stepping-stone to future conquests, and will abandon it as an useless acquisition.

"In that case our *raison d'être* at Cyprus will be at an end, and we shall retire[29]."

[29] Turkey, No. 48 (1878). Parliamentary Paper.

CHAPTER V.

THE KINGDOMS OF THE LOWER DANUBE.

The ancient Principality of Servia—Treaties of Sistova, Bucharest, Adrianople, and Ackerman—Organic Statute of Servia, 1838—Its *status* under the Treaty of Paris of 1856—Anomalous relations of Servia to the Porte after 1876—Its independence recognised under the Treaty of Berlin of 1878—The Prince recognised by the European Powers as King in 1882—Ancient Principalities of Walachia and Moldavia—Treaties of Carlovitz, Kutschuk-Kainardji, Bucharest, Adrianople, and St. Petersburg—Convention of Balta-Liman—Treaty of Paris, 30 March, 1856—Subsequent changes in the *status* of Walachia and Moldavia—Union of the two Principalities into one State under the name of Roumania in 1865—Its independence recognised by the Porte and by the European Powers in 1878—Retrocession by Roumania of territory in Bessarabia previously ceded by Russia under Treaty of Paris of 1856—The Prince of Roumania recognised as King in 1881—The Principality of Montenegro—Treaties of Carlovitz, Passarovitz, and Sistova—Congress of Paris of 1856—The independence of Montenegro acknowledged by the Porte under the Treaty of San Stefano of 3 March, 1878, and generally recognised by the Signatory Powers of the Treaty of Berlin on 13 July, 1878.

The Principality of Servia, now the kingdom of Servia.

§ 74. An improved organization of the Christian Dependencies of the Ottoman Empire situated in Europe was one of the objects in view, when a general Treaty of Peace was signed at Paris on 30 March, 1856, between Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, and when it was thought desirable and practicable to maintain the integrity of the Ottoman Empire. Those Dependencies had always maintained relations with the Porte of a different character from those of the Mahommedan Dependencies. They consisted of the Principality of Servia,

the two Danubian Principalities as they were sometimes termed, namely, Walachia and Moldavia, and the Prince-Bishopric of Montenegro. Servia is the most important of these States, whether we regard its political antecedents, or its present military power. The Servians in the Twelfth Century had laid the foundation of an Empire, which underwent rapid development and which embraced, in the middle of the Fourteenth Century prior to the Ottoman Invasion, all Macedonia, certain towns in Thessaly and Albania, and portions of Thrace. The Independence of Servia terminated with the disastrous battle of Kossova, (15 June, 1389,) after which event its territory was divided by its Ottoman conquerors into various Pachaliks, the chief of which was established at Belgrade. It was not until the commencement of the present century, (anno 1804,) that the Servians awakened to the recollection of their former Independence, and rose in insurrection against the Janissaries of Belgrade, who in defiance of the stipulations of the Treaty of Sistova[1] (4 August, 1791) had reoccupied Servia and were perpetrating cruelties of the most atrocious character. The Servians, under the leadership of Kara George, and with the countenance of the Porte itself, succeeded in expelling the Janissaries out of Servia, and afterwards finding their newly acquired liberty too sweet to be relinquished, resolved to establish a National Government with Kara George as its Chief (Vosd). The Russian Government had meanwhile undertaken to advocate the cause of the Servians with the Porte, and when war broke out in 1806 between Russia and the Porte, the Servians having successfully laid siege to Belgrade, joined their forces to those of Russia. The peace of

Treaty of Sistova, 4 Aug. 1791.

[1] Martens, Recueil, Tom. V. p. 244.

Bucharest (28 May, 1812 [2]) left the Servians practically at the mercy of the Porte, although Russia had made certain highly favourable stipulations on their behalf in her treaty with the Porte, and Servia was thereupon once more reduced to the condition of a Turkish Province. But the spirit of Independence amongst the Servians was not extinguished. It broke forth at intervals, was countenanced by Russia, and at last, with the support of that Power, Servia obtained from the Porte the recognition of its administrative Independence, in pursuance of the provisions of the Treaty of Adrianople [3] (14 Sept. 1829) concluded between Russia and the Ottoman Porte. This recognition took place under the form of a Hatti Cherif, (29 Nov. 1829,) in which the Sultan declared, that having regard to the Treaties of Bucharest and Adrianople, as well as to the Convention of Ackerman [4], (7 Oct. 1826,) and likewise to the prayers of the Servians, who had always been faithful subjects of his Empire, he had accorded to them the liberty of Christian Worship, and an Independent Internal administration, with various other privileges in accordance with the provisions of a separate Act annexed to the Treaty of Ackerman. The political Constitution of Servia was subsequently settled by an Organic Statute, issued by the Sultan in 1838. This Statute conferred the Sovereignty of the Province upon Prince Milosch and his family, the princedom being declared to be hereditary in his family; and after enumerating other matters of detail, conferred upon him (A) the nomination of public functionaries, (B) the command of the troops, (C) the powers of the Exequatur, (D) the collection of the taxes, (E)

Treaty of Bucharest, 28 May, 1812.

Treaty of Adrianople, 14 Sept. 1829.

Treaty of Ackerman, 7 Oct. 1826.

Organic Statute of Servia.

[2] Martens, N. R. Tom. III. p. 197.

[3] Ibid. VIII. p. 116.

[4] Ibid. VI. p. 1053.

the control of the provincial authorities, (F) the jurisdiction over criminals. At this period, (anno 1829,) when Lord Ponsonby on behalf of Great Britain was suggesting certain modifications in the Organic Statute, the Sultan refused to recognise any title in Great Britain to interfere in the affairs of Servia, but admitted the right of Russia under her treaties with the Porte to exercise a voice. The Treaty of Paris [5], (30 March, 1856,) placed the established relations between Servia and the Ottoman Porte under the collective guaranty of all the Powers which were parties to that treaty. The Suzerainty of the Porte, and its right of garrison as heretofore, were maintained on the one hand; whilst, on the other hand, the Principality of Servia retained its National and administrative Independence, as well as full liberty of worship, legislation, commerce, and navigation; nor could any armed intervention take place in Servia without a previous accord amongst the High Contracting Powers. It would be out of place in the present treatise to follow the fortune of Prince Milosch and his family; it will be sufficient to have traced the International vicissitudes of the Principality, and to have shown how its present anomalous state of International transition is founded upon Treaty-engagements between the European Powers and the Emperor of the Ottomans, in his character of Suzerain.

Servia.

§ 75. To pass over intermediate events of minor importance, it may be sufficient to state that on 22 June, 1876, Prince Milan Obrénovitch, who had been proclaimed Prince of Servia on 2 July, 1868, upon the pretext of defending the Christian populations of Bosnia and Herzegovina against the violent oppres-

[5] Martens, N. R. Général, XV. p. 770.

sion of the Bosniak Beys, demanded from the Porte its authorisation to take military possession of those two provinces and to administer them permanently, which the Porte refused. War thereupon ensued between the Porte and the Principality, which was brought to a close by a Convention re-establishing the *Status quo ante* on 28 February, 1877, of which event formal cognisance was taken by the Christian Powers, which were parties to the Treaty of Paris (1856), in a Protocol signed at London on 31 March, 1877. This peace was of short duration, as Servia again declared war against Turkey on 14 Dec. 1877, on the ground that the Porte had not given full effect to the provisions of the Treaty of Peace of the previous month of February. The Porte thereupon issued a Proclamation on 20 Dec. 1877, declaring that Prince Milan had forfeited his title to the throne of the Principality. These anomalous relations between Servia and the Porte were put an end to by the Treaty of San Stefano concluded on 3rd March, 1878, between Russia and the Porte, by the third article of which Treaty the Porte recognised the Independence of Servia. The Independence of the Principality obtained an European recognition from the Powers subsequently assembled in Congress in Berlin, who undertook, in conformity with the Stipulations of the Treaty of Paris (1856), to which they were parties, to regulate in the interest of European Order the questions, which had arisen in the course of the wars between the Ottoman Porte and Russia, to which war the Treaty of San Stefano had put a provisional termination. The result of the deliberations of the Powers in regard to Servia was embodied in Article XXXIV of the Treaty of Berlin of 13 July, 1878, which recognised the independence of Servia subject

Independence of Servia.

The Kingdom of Servia.

to the condition of all religious confessions being allowed complete liberty and civil equality. The Prince Milan Obrénovitch has since assumed the title of King by a Decree of 6 March, 1882, and his title of King of Servia has been recognised by the European Powers.

The Principalities of Walachia and Moldavia, now the Kingdom of Roumania.

§ 76. The Principality of Walachia had paid tribute to the Ottoman Porte since the commencement of the Fifteenth Century, although the Sultans were not really masters of Walachia until the death of Wlad, (anno 1461,) the last Independent Prince. From this period down to 1521, Walachia was governed by its own Voievodes, elected by the Boyards and confirmed by the Sultan. Soleiman I, whose brilliant reign has earned for him from Christian historians the titles of the Great and the Magnificent, but whom the Ottomans have distinguished by the more modest epithet of the Lawgiver, determined to add Walachia substantively to his Empire, and to place over it a Governor of his own choice. He accordingly appointed Mohammed Bey to the post of *Sandjakbey* of Walachia. This personage, having lulled the Boyards into security by a Treaty, in which he guaranteed to them their ancient privileges, caused the Prince, whom they had elected according to custom, to be assassinated at the moment when the Sultan's Commissary pretended to instal him into office. So flagrant an atrocity led to the armed intervention of the Hungarians under Jean Zapolya, and the Sultan was induced, after a series of disastrous conflicts, to restore the Principality to its ancient condition of a tributary State under an elective Prince. Moldavia, on the other hand, had recognised the Sovereignty of the Ottoman Porte in 1516, and after the campaign of Vienna, Raresch, Prince of

Moldavia, did homage to the Sultan Soleiman I, and received from him a diploma which secured to the Christian population the liberty of religious worship, and conferred upon the Boyards the election of the Prince, subject to the ratification of their choice by the Sultan, and to the condition of paying an annual tribute at Constantinople. The fortunes of Moldavia were for a short time mixed up with those of Transylvania, which latter province upon the conclusion of the peace of Sitvatorok, (11 Dec. 1606,) had also become a tributary State of the Ottoman Empire under the government of an Elective Prince. Soon after that event the Estates of Transylvania elected Gabriel Bethlen to be their Voievode, (anno 1613,) who being supported by the Porte in his schemes of territorial aggrandisement against Hungary, but not daring to place upon his own head the ancient Crown of St. Stephen, endeavoured to found a new Empire. In this policy Gabriel Bethlen was supported by England, France, Holland, and the Republic of Venice, and was even permitted by the Sultan to enter directly into political treaties with those Powers. The Emperor Ferdinand II was ultimately fain to conclude two successive treaties[6] with Gabriel Bethlen as an Independent Prince: and upon the re-establishment of peace between the Emperor and the Sultan, Gabriel Bethlen demanded for himself from the Porte the investiture of the principalities of Moldavia and Walachia, with the title of King of Dacia. The death of Gabriel Bethlen, which happened soon afterwards from natural causes, opened the way to great changes in the condition of the Principalities. Rakcoczy was elected to the office of Voievode by the Estates of Transylvania, and his

Peace of Sitvatorok, 11 Dec. 1606.

[6] Von Hammer, Histoire de l'Empire Ottoman, IX. p. 118.

election was confirmed by the Ottoman Porte. Moldavia on the other hand, and Walachia, which had hitherto been governed by native Princes, became a prey to the avarice of the Viziers of the Porte, and to the intrigues of Greek and other adventurers, who pretended successively to the Crown of Dacia[7].

Treaty of Carlowitz, anno 1699.

The Treaty of Carlowitz[8] (anno 1699) deprived the Ottoman Porte definitely of its Suzerainty over Transylvania, and soon afterwards the Boyards of Moldavia were authorised by the Sultan to choose as Hospodar (or Farmer of the Province) one of themselves (3 Oct. 1703). The Voievodeship of Walachia was meanwhile sold for the most part to the person who offered the highest rent as Hospodar, and gave the most costly presents to the Grand Vizier. The two Principalities were now and then granted to one and the same person, but the instances of this twofold Investiture are very rare.

Treaty of Kutschuk-Kainardji.

§ 77. Such is an outline of the political vicissitudes through which the two Danubian Principalities have passed, prior to the Treaty of Kutschuk-Kainardji[9], (10 July, 1774). By this treaty, the Empress Catharine of Russia agreed to restore to the Porte the province of Bessarabia, and the Principalities of Moldavia and Walachia, which the Russian armies had overrun. The stipulations in favour of the Principalities were peculiar. It was provided that the inhabitants should have the free exercise of the Christian Religion, and that the Prince of each Principality should be allowed to maintain a Chargé d'Affaires at Constantinople, to superintend the affairs of each

[7] Moldavia was ruled successively by Yankoul a Saxon, (anno 1580,) Gratiani, a Croat, (anno 1618,) Bernawski, a Pole, (anno 1626,) and Alexander Elias, a Greek, (anno 1620—1631.)

[8] Schmauss, Corp. Jur. p. 1133.

[9] Martens, Recueil, II. p. 286.

Principality, and who should be entitled to the privileges of an Envoy under the Law of Nations. The Porte also consented that the Russian Ambassador at Constantinople might advocate the cause of the Principalities, if circumstances required it; and promised to listen to him with respect and favour. An explanatory Convention was subsequently signed at Constantinople (10 March, 1779[10]), in which the right of the Porte to levy tribute from the Principalities was submitted to certain regulations. By the next following Treaty of Bucharest, (28 May, 1812[11],) the Ottoman Porte ceded to Russia those portions of Moldavia which lay on the left bank of the Pruth; which river was to be henceforth the boundary of the Ottoman and Russian Empires. The subsequent Treaty of Adrianople (14 Sept. 1829) made an important change in the International Status of the Principalities. The Fifth Article, which referred to Moldavia and Walachia, as being under the Suzerainty of the Porte and the Guaranty of Russia, stipulated that they should enjoy an Independent National administration, and full liberty of commercial intercourse, with special reference to certain provisions contained in a separate Act annexed to the Treaty. Under this Act it was provided that the office of Hospodar should be an office for life; subject in other respects to the regulation of the separate Act of the Convention of Ackerman[12] (7 Oct. 1826). By the latter Act, which purported to explain the Treaty of Bucharest, it had been provided that the Hospodars should not be dismissed from their office by the Porte, without the permission of Russia; and

Convention of Constantinople, 10 March, 1779.

Treaty of Bucharest, 28 May, 1812.

Treaty of Adrianople, 14 Sept. 1829.

Convention of Ackerman.

[10] Martens, Recueil, II. p. 653.
[11] Martens, Nouveau Recueil, III. p. 397.
[12] Martens, N. R. VIII. p. 143.

the Russian Consuls were empowered concurrently with the officers of the Porte to remonstrate with the Hospodars, if they should infringe in any manner the privileges of the Country in regard to taxes and other imposts. The Porte further undertook by the Treaty of Adrianople, (14 Sept. 1829,) that no Mussulman should set foot in the Principalities except for temporary purposes of commerce [13]. The Internal administration of the two Principalities was to be perfectly Independent, and their Governments were authorised to raise a native militia for the purpose of enforcing the Quarantine regulations, protecting the frontiers, maintaining peace and order, and executing the laws. By a subsequent Treaty signed at St. Petersburg, (29 Jan. 1834,) and kept secret for some time [14], it was agreed that the Hospodars should for that turn be nominated according to an agreement between Russia and the Porte ; and it was further stipulated that the Porte should give regimental colours to the native militia which kept garrison in the Interior of the two Provinces ; and a flag for the Walacho-Moldavian merchant vessels navigating the Danube.

Treaty of St. Petersburg, 29 Jan. 1834.

The last Convention which it is necessary to notice is that of Balta Liman [15], (1 May, 1849,) under which Russia and the Porte by common consent suspended the existing political Constitution of the Principalities, as established by the Organic Statute of 1831, and made arrangements for a Commission of Boyards to submit a new political Constitution for the mutual

Convention of Balta Liman, 1 May, 1849.

[13] Martens, N. R. VI. p. 1053.

[14] This circumstance may account for this treaty not being found in any general collection of treaties. It occurs amongst the Treaties (Political and Territorial) between Russia and Turkey, (1774—1849,) presented to both Houses of Parliament by command of her Majesty, 1854.

[15] Martens, N. R. Général, XIV. p. 378.

approval of the two Courts. Meanwhile Russian and Ottoman troops were to occupy the Principalities, and the two Courts were to have each an extraordinary Commissioner resident in the Principalities. These Commissioners were to offer their advice and counsel in common to the Hospodars, and were to agree together in selecting the Commission of Boyards to revise the Constitution. It was further provided that all the previous treaties confirmed by the separate Act of the Treaty of Adrianople should retain their full force and effect.

§ 78. It is difficult in examining the Convention of Balta Liman to appreciate the political relations under which the two contracting Powers respectively claimed to deal with the Internal affairs of the Principalities. It is recited in the preamble, that they act in a spirit of fidelity to their antecedent engagements, which secure to the Principalities the privileges of a distinct administration and certain other local immunities; and that it has become necessary to adopt by common agreement extraordinary and effectual measures for the *protection* of those immunities and privileges, which the Principalities ought to enjoy, in virtue of solemn treaties concluded between Russia and the Sublime Porte. It would thus seem that the right of joint action on the part of the Two Powers was held to rest on antecedent Treaty-engagements, under which they were called upon to exercise a joint *Protectorate* over the Principalities. The Sixth Article reserved to the two Courts the right at the expiration of seven years to take into consideration the then existing State of the Principalities, and to determine upon the ulterior measures which they might judge most suitable, to ensure their well-being and tranquillity. No allusion was

made throughout this Convention to the Sovereignty of the Sublime Porte, and the two Imperial Courts were to have in substance an equal voice in directing the political action of both Principalities. The establishment of a Russian Resident in each Principality by the side of an Ottoman Resident, with a right of *political action* within a certain sphere, as distinguished from the *commercial agency* of a Consul, was ostensibly a step in the direction of recognising the Independence of the Principalities. On the other hand, as each Resident was entitled under the treaty to advise and counsel the Hospodars, each Power possessed an indirect right to control the Internal administration of the Principalities. The right of the Sultan indeed rested upon ancient Capitulations with the Principalities themselves, whereas the right of the Emperor of Russia rested upon Conventions with the Sultan; who may be thus taken to have bound himself by treaty to share with Russia the active duties of the Suzerainty, which he exercised under the Capitulations.

Treaty of Paris.

§ 79. Such was the peculiar *Status* of the Danubian Principalities before the Treaty of Paris of 1856. Their political relations were certainly ambiguous, but there is no difficulty in arriving at the conclusion that they were not Members of the Family of Nations. They had not the right of Legation under the Law of Nations, for the reception of their Resident Chargés d'Affaires at Constantinople was exceptional, and their functions were regulated by a special convention between the Porte and Russia; they had not the right of Alliance, as all public treaties respecting the Principalities were concluded between their Suzerain and Foreign Powers. The Consuls maintained by Foreign Powers at Bucharest and Galatz were ac-

credited to and received their Exequatur from the Sublime Porte, and no political or commercial agents on behalf of the Hospodars had ever been received by Foreign Courts. The conditions of the Principalities in all these respects were not in any way changed by the Treaty of Paris[16] (30 March, 1856). By Article XXII, the Principalities of Walachia and Moldavia were to continue to enjoy under the Suzerainty of the Porte and the Guaranty of the Contracting Powers the privileges and immunities of which they were in possession. No exclusive *Protection* was to be exercised over them by any of the Guaranteeing Powers, nor was any Power to have any special right to interfere in their internal affairs. By Article XXIII, the Sublime Porte engaged itself to secure the Principalities an Independent and National administration, as well as perfect liberty of worship, legislation, commerce, and navigation; and after the opinion of the Representatives had been taken as to the definitive organization of the two provinces, the Porte undertook to confirm that organization by a Hatti-Cherif, and the Provinces were henceforth to remain under the collective guaranty of all the Contracting Powers. The Principalities were to have a National army to maintain public order and to protect their frontiers, and no armed intervention could take place without a previous agreement amongst the Powers who had signed the Treaty of Paris.

§ 80. The organization of the two Danubian Principalities has undergone a fundamental change since the Treaty of Paris of 1856. By a Convention of 19 August, 1858, between the two Principalities, a Central Commission was established, charged with maintaining an uniformity of legislation in matters

[16] Martens, N. R. Général, Tom. XV. p. 770.

of common interest. In 1859 the Assemblies of the two Principalities concurred in electing Prince Alexander Couza as Hospodar of the two Principalities, and the Porte, by a Firman of 4 Dec. 1861, in concert with the guaranteeing Powers, established an union of the two Governments and of the two Assemblies, which was to terminate however with the government of Prince Couza. Finally the Porte, with the concurrence of the guaranteeing Powers, recognised in 1864 the rights of the Principalities to modify their internal administration, saving always the rights of the Suzerain Power. The immediate result of this concession on the part of the Suzerain Power was that the two Principalities united themselves into one State under the title of Roumania in 1865. Prince Couza having abdicated the Princely Throne of Roumania[17] shortly after that event, the Powers who were parties to the Treaty of Paris of 1856, assembled in Conference at Paris on 10 March, 1866, in order to examine the questions which the vacancy in the Hospodariate had given rise to; and whilst the Powers were still in Conference, the Roumanian people by a plebiscite elected Prince Charles Louis of Hohenzollern-Sigmaringen to be Prince of the United Principalities under the name of Charles I. The European Powers after some hesitation recognised the election of Prince Charles, and the Porte granted him its investiture on 23 Oct. 1866. In the following year a rupture of friendly relations took place between the Porte and Roumania, and from 3 June, 1867, the Principality declared itself to be independent of the Porte. It followed the fortunes of Russia in the ensuing war, and its independence was recognised

Moldavia and Walachia united under the title of Roumania.

Roumania constituted a kingdom.

[17] On 23 Feb., 1866, Recueil des Traités de la Porte Ottomane, par le Baron de Testa. Tom. V. p. 514.

by the Porte under Article V of the Peace of San Stefano (3 March, 1878). The European Powers subsequently recognised the Independence of Roumania under Article XLIII of the Treaty of Berlin (13 July, 1878), subject to the same conditions of religious liberty and civil equality as were stipulated in the case of Servia. Prince Charles has since that Treaty assumed the title of King of Roumania, in accordance with the unanimous vote of the people of the United Principalities, on 26 March, 1881, and his title of King has been recognised by the European Powers. He was crowned on 22 May, 1881.

Roumania constituted a kingdom.

A somewhat important change was made under Article XLV of the Treaty of Berlin (1878) in the territorial arrangements sanctioned by the Treaty of Paris (1856). The Principality of Roumania ceded back to Russia the portion of the territory of Bessarabia, which had been detached from Russia under the Treaty of Paris, 1856, limited to the West by the mid-channel of the River Pruth, and to the South by the mid-channel of the Kilia branch of the Danube, and the embouchure of Stary-Stamboul. Under the preliminaries of the Peace of San Stefano Turkey had agreed to cede to Russia the Sandjak of Toultcha on the South side of the Danube, including the Cazas of Kilia, Soulina, Mahmoudié, Isaktcha, Toultcha, Matchin, Babadagh, Hirsovo, Kustendje, and Mehjidié, together with the Isles of the Delta of the Danube and the Island of Serpents. Russia reserved to herself the right of exchanging the territory above specified for the portion of Bessarabia detached from Russia under the Treaty of Paris of 1856, and limited on the South by the Thalweg of the Kilia branch of the Danube and the embouchure of Stary-Stamboul. This exchange on

Retrocession to Russia of a portion of Bessarabia.

the part of Russia was approved by the Powers in Article XLVI of the Treaty of Berlin, 1878, and in addition there was assigned to Roumania the territory South of the Dobroutcha, bounded by a line drawn Eastwards from Silistria to the Black Sea, at a point South of Mangalia[18]. Further allusion will be made to this arrangement in a subsequent chapter on the navigation of Great Rivers.

The Principality of Montenegro.

§ 81. Montenegro, or Tzernegóra, as it is styled in the language of the native people, is a small State, which formed in 1856 an integral part of the Ottoman Empire. It is called by the Ottomans Karadagh, which has the same meaning as Tzernegóra, namely, the Black Mountain; the name of the people in their own language is Tzernegórki. Montenegro was considered by the Ottomans to be a department of the Pachalik of Scutari. It was originally a district of Servia, when that Country was ruled by its own Kings, and it was governed by a Prince dependent on the Servian Monarch. After the Conquest of Servia by the Ottomans (anno 1389), the Princes of the Family of Tzernoievich maintained for a considerable time their Independence, but the Ottoman Armies having overrun Albania and obtained possession of Herzegovina, George Tzernoievich with the consent of the people transferred the Government of Montenegro into the hands of the Bishop, and withdrew to Venice (anno 1516). Since that period the Spiritual and the Temporal Powers were vested in a Prince Bishop, who was entitled the *Vladika*, which signifies Prince or Ruler. This Office, although *de jure* elective, has been in practice hereditary in the Family of Petrovich since the close of the Seventeenth Century, but as

The Vladika, or Prince Bishop.

[18] Samwer and Hopf., Traités, 2me Série. Tom. III. p. 253. Ibid. p. 463.

every Vladika is consecrated Bishop and cannot marry, the succession has always passed to a nephew, or such other member of the family as might happen to be the next heir. The Ottomans during the Sixteenth Century made frequent inroads into the Country, but failed to establish themselves in it, and it was not until A.D. 1623 that Soleiman, Pacha of Scutari, succeeded in penetrating to Tzetenie, the Capital, when the Supremacy of the Sublime Porte was in name established over the Black Mountain. The Ottomans, however, have never been able to remain in possession of the Country, and the Montenegrins have been always ready to co-operate with the Venetians, or with the Austrians, in their wars against the Porte. By the Treaty of Carlovitz[19] (anno 1699) Montenegro appears to have been left by the Ottomans under the Protectorate of Venice. By the Treaty of Passarovitz (anno 1718)[20] it was in terms ceded back by Venice, and became again subject to the Porte, and its dependence on the Porte was recognised by Austria in the Treaty of Sistova[21] (anno 1791), when the latter Power stipulated that the Montenegrins should not be molested or punished by the Porte for having declared against their proper Sovereign. Relations of a very singular kind were established in 1706 between the Montenegrins and the Emperor Peter the Great of Russia. The Montenegrins placed themselves formally under the *Protection* of Russia and took the oath of allegiance to the Czar, since which period it has been usual for the successor of each Vladika to receive consecration at St. Petersburg, and his consecration as Bishop has been a virtual investiture of his office as Vladika. It

Treaty of Carlovitz.

Treaty of Passarovitz.

Treaty of Sistova.

[19] Schmauss, Corp. Jur. p. 1133. [20] Id. p. 1740.
[21] Marens, Recueil, Tom. V. p. 244.

is stated by some writers that the Vladika, who succeeded in 1830, refused the Episcopal dignity and was a lay Chief. The more correct account is as follows:—On the death of Pietro I. on the 30th Oct., 1830, his nephew whom he had recommended as his successor, being only fifteen years of age, was admitted into Holy Orders, but being too young to take the reins of Government, or to receive the Episcopal dignity, a *locum tenens* was appointed, and Sr. Ivanovich was sent from St. Petersburg to govern the Country, until the consecration of the new Vladika. This took place at St. Petersburg on 18th August, 1833[23], after which the youthful Vladika returned to his own Country and carried on the Government until his death in 1851, when he was succeeded by Daniel I, who perished by the hand of an assassin in 1860. It was the late Prince Daniel I, whose early education was carried on at Vienna and not at St. Petersburg, who once more separated the secular functions of the office of Prince from the spiritual functions of the office of Bishop. His Code of Laws[24] promulgated at Tzetenie, 23 April, 1855, purports to be issued under the hand of Daniel Prince of Montenegro and Prince of Berda, the latter title being taken from the Eastern division of the Country.

The Prince of Montenegro no longer Bishop.

Since the Peace of 1815 the Montenegrins have been constantly at war with the Ottoman Porte, and the latter Power has made the most determined efforts to reduce them to submission both in 1839 and in 1852. On the latter occasion Russia and Austria employed

[23] Wilkinson's Dalmatia and Montenegro, I. p. 464.

[24] A German translation of this Code has been published at Vienna under title of Gesetzbuch Danieli I. Fürsten und Gebieters von Montenegro und der Berda. Wien, 1859. Verlag von Friederich Manz.

their good offices on behalf of the Montenegrins, whilst France and Great Britain counselled the Porte to respect the *de facto* Independence of Montenegro, without abandoning its *de jure* Title over the Country. The Montenegrins, however, failed to obtain any improvement of their international Status through the good offices of the Christian Powers who took part in the Congress of Paris (1856), when the Ottoman Plenipotentiaries took occasion to declare that "the Sublime Porte considers Montenegro to be an integral part of the Ottoman Empire, but that it has no intention to alter the actual state of things in that Country[25]." During the interval which elapsed between the Peace of Paris of 1856 and the Treaty of San Stefano, the relations between the Prince of Montenegro and the Ottoman Porte have been repeatedly troubled, but the Porte always succeeded in maintaining its Sovereignty over the Principality until Montenegro declared war overtly against Turkey on 2 July, 1876, from sympathy with the insurrection in Herzegovina. In the correspondence[26] which ensued between Austria-Hungary and the Porte, in consequence of the former Power objecting to the Porte's use of the harbour of Klek for belligerent purposes, Austria-Hungary intimated her opinion, that as the Prince of Montenegro neither received investiture from the Porte nor paid tribute to the Porte, he was to be considered *de facto* independent of the Porte (30 July, 1876). The Christian Powers who had been parties to the Treaty of Paris, 1856, felt themselves called upon in the course of the following autumn to attempt to mediate between the Porte

Congress of Paris of 1856.

[25] Protocols of Conferences 25 and 26 March, 1856. Martens, N. R. Général, XV. p. 736, 738.

[26] Recueil Général des Traités, par Samwer et Hopf. 2me Série. Tom. III. p. 26.

and the Principality, and they endeavoured in a series of Conferences held at Constantinople (11–22 Dec., 1876), to reestablish relations of peace between them on the basis of the *Status quo ante*, subject to a certain rectification of the frontier of the Principality and to the concession to it on the part of the Porte of the free navigation of the River Bojana, so as to afford to the Principality access to the Sea, from which it had been hitherto debarred. Upon the failure of the Christian Powers to come to a satisfactory understanding with the Porte as to the amelioration of the condition of its Christian subjects generally in Bosnia, Herzegovina, and Bulgaria war was declared by Russia against the Porte on 24 April, 1877, and the result was that the Porte was compelled by a series of reverses to agree to the conditions of the Treaty of San Stefano of 3 March, 1878 [27]. Under Article II of this treaty the Sublime Porte recognised definitively the independence of the Principality of Montenegro. A more general recognition of its Independence on the part of the European Powers was subsequently placed on record in Article XXVI of the Treaty of Berlin of 13 July, 1878 [28], and perfect liberty of religious worship was at the same time assured to all the inhabitants of the Principality. It was further provided in Article XXIX, by which Antivari and its coast was annexed to Montenegro, that the port of Antivari and all the waters of Montenegro should be closed against the war-vessels of all nations. Montenegro was also forbidden to have a war-flag or to keep any vessels of war. Austria-Hungary undertook meanwhile that her light-guardships should maintain the police of the Montenegrin Coast.

[27] Nouveau Recueil Général, par Martens et Samwer. 2me Série. Tom. III. p. 246.

[28] Ibid. p. 449.

CHAPTER VI.

SOURCES OF THE LAW OF NATIONS.

Natural and Positive Law—Natural Law of Nations—Positive or Voluntary Law of Nations—Vattel's Subdivision of Positive Law—Customary and Conventional Law—Identity of the Law of Nations with the Law of Nature, according to Hobbes and Puffendorf—The Law of Nations a Special Science, according to De Wolff and Vattel—Essential Difference between Nations and Individual Human Beings—The Law of Nature—Identical Natural Law of Rude and Civilised Nations—Growth of the Positive Law of Nations—Study of the Law of Nations in England—Courts of the Law of Nations—Customary or Consuetudinary Law of Nations—Customary Relations with Non-Christian Powers Exceptional—The Primary Principles of European Public Law applied to Mahommedan States—The Diplomatic Science—Conventional Law of Nations—Views of Martens and others contrasted with those of Schmalz and others—Ortolan's View of the Effect of Conventions on General Law—Wheaton's Earlier and Later Views—Illustration as to Contraband of War—Declaration of Maritime Law at Paris, 16 April, 1856—Preambles and Recitals of a Declaratory Character—Objections to the Idea of any Law, as such, between Nations—International Morality distinct from the Law of Nations.

Natural and Positive Law.

§ 82. THE proper and immediate subjects of the Law of Nations being those political communities which are in a state of Independence, and the test of their Independence being their aptitude or capacity to discharge the obligations of Natural Society towards other political communities and to regulate the mode of discharging those obligations without the consent of any Political Superior, the rules which result from their mutual relations, and which govern their intercourse, resolve themselves into Natural rules and Positive rules, and the aggregate body of those rules, which admit of being enforced, constitute the Law of

Nations in the most extensive sense of the term. The Law of Nations accordingly divides itself into Natural or Necessary Law, and Positive or Instituted Law[1].

Natural Law of Nations.

§ 83. The Natural Law of Nations is founded on the Nature of Independent States, as such, and is the result of the relations observed to exist in Nature between Nations as Independent Communities[2]. The Positive Law of Nations, on the other hand, is based on the consent of Nations, and is the result of the relations instituted between them by their own free will. The sanction of the Natural Law of Nations is found in the fact that its violation terminates the existence of an Independent State, as such. The sanction of the Positive Law of Nations is found in the isolation of the State which disregards it. The obligation of the former is involuntary, whereas the obligation of the latter is consensual[3], and the consent of Nations to it is either substantially evidenced by

[1] *Natural Law*, according to Puffendorf, is that which is so exactly fitted to suit with the rational and social nature of man, that human kind cannot maintain an honest and peaceful Fellowship without it. *Positive Law*, on the other hand, he writes, is sometimes called by the name of Voluntary, because no positive law has such an agreeableness with Human Nature as to be necessary in general for the preservation of mankind, or as to be known or discovered without the help of express and peculiar promulgation. Law of Nature and of Nations, B. I. c. 4. § 18.

[2] Esse autem aliquid juris naturalis probari solet ab eo quod prius est, tum ab eo quod posterius, quarum probandi rationum illa subtilior est, hæc popularior. A priori, si ostendatur rei alicujus convenientia aut disconvenientia necessaria cum natura rationali et sociali. A posteriori vero, si non certissima fide, certe probabiliter admodum, juris naturalis colligitur id, quod apud omnes gentes, aut moratiores omnes tale esse creditur. Nam universalis effectus universalem requirit causam; talis autem existimationis causa vix ulla videtur esse posse præter sensum ipsum, communis qui dicitur. Grotius de Jure Belli et Pacis, L. I. c. 1. § 12.

[3] Pacto obligamur; lege obligati tenemur. Pactum obligat per se; lex obligatum tenet virtute pacti universalis de præstanda obedientia. Hobbes, De Civ. *Imperium*, c. 14. § 2.

their unvarying practice, or has been formally recorded in some Public Act or Convention.

Positive or Voluntary Law of Nations.

§ 84. Grotius in constructing his system of Public Law had perceived that certain rules of International Life, which were universally observed, could not be fairly deduced from any admitted principles of Natural Right. He concluded accordingly that they had been introduced by the Consent of Nations, and rested upon Custom and tacit Compact (moribus et pacto tacito introductum[4]). It was this entire Body of Law which Grotius comprised under the head of *Jus Gentium Voluntarium* or *Jus Constitutum*[5]. De Wolff, on the other hand, distinguished the *Jus Voluntarium* from the *Jus Pactitium* and *Jus Consuetudinarium*, and whilst Grotius considered the Voluntary Law of Nations to be based upon the general consent of Nations as evidenced by their practice, De Wolff regarded it as a body of rules deduced from the nature of the Social Union amongst Nations, and from the operation of which no civilised Nation can withdraw itself. De Wolff accordingly held the Voluntary Law of Nations to be universally binding upon civilised Nations, whilst the obligation of the Customary Law of Nations was limited to those Nations, amongst whom it had been established by long usage.

De Wolff in establishing the foundations of that species of the Law of Nations, which he termed Vo-

[4] Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes aut plerasque *ex consensu* jura quædam nasci potuerunt, et nata apparent, quæ utilitatem respicerent non cœtuum singulorum, sed magnæ illius universitatis. De Jure Belli et Pacis, Proleg. § 17.

[5] Grotius divided Voluntary, as distinguished from Natural Law, into law directly instituted by God and law instituted by Man, but he considered the instituted Law of God, as far as Nations are regarded, to be confined to the Jewish Nation. De Jure Belli et Pacis, L. I. c. 1. § 15, 16.

luntary, had assumed the existence of a Great Commonwealth (*Civitas Maxima*)[6] of which all civilised nations were members. The *Jus Gentium Voluntarium* accordingly occupied a place in the Great Commonwealth analogous to that which the *Jus Civile* holds in Individual States.

Vattel, however, has not followed De Wolff in his fiction of a Great Commonwealth of Nations; he holds that fiction to be neither very just nor very solid, but he has retained the division of Voluntary Law as distinct from Customary and Conventional Law. Vattel however does not agree with De Wolff in the grounds upon which the latter rests the obligation of Voluntary Law; on the contrary, he regards it as a branch of Positive Law derived from the *presumed* consent of Nations, whilst he rests the Conventional Law upon their *express* consent, and the Customary Law upon their *tacit* consent. As there can be no other mode of deducing any law from the will of Nations, there are only, he says, these three Species of Positive Law.

Subdivision of Positive Law.

§ 85. This threefold subdivision of the Positive Law of Nations, which Vattel has popularised, is objectionable in principle, and it is at the same time practically inconvenient. It is objectionable in principle, as it involves what Logicians term a cross-division, for Conventional and Customary Law are evidently *subordinate* branches of Voluntary Law, and it will tend rather to confuse than to elucidate the subject, if we should class them by the side of Voluntary Law as *coordinate Species* of one and the same *Genus*. In the second place, the threefold subdivision is practically inconvenient, for certain rules of international

[6] Civitas, in quam Gentes coivisse intelliguntur, et cujus ipsæ sunt membra, sive cives, vocatur *Civitas Maxima*. Jus Gentium, § 10.

intercourse which Vattel, following the authority of De Wolff, ranks under the head of Voluntary as distinguished from Conventional and Customary Law, would seem rather to partake of the character of Natural Law, as they are derived from the natural relations of independent political societies. For instance, in discussing the foundation of Voluntary Law Vattel says [7], "It is therefore necessary on many occasions that Nations should suffer certain things to be done, though in their own nature unjust and condemnable, because they cannot oppose them by open force without violating the liberty of some particular States, and destroying the foundation of their *natural society*. And since they are bound to cultivate that Society, it is *de jure* presumed, that all Nations have *consented* to the principle which we have just established. The rules which are deducible from it constitute what De Wolff calls the Voluntary Law of Nations." It is obvious, however, that Nations are under a *natural* obligation to refrain from all acts which tend to destroy their Natural Society. A scrupulous respect for the independence of Individual States, evidenced by a systematic abstinence from all encroachments upon that independence, is a necessary condition of Permanent Fellowship amongst Nations. *Non-interference* to such an extent would thus seem to be a *natural law* of international life, and it is superfluous to presume a *consent of Nations* as an authority for the rule of such Non-interference. On the contrary, we should rather weaken the sanctions of such a rule, if we were to class it under the head of *Voluntary* as opposed to *Necessary Law*, and were to suppose it to rest upon the will of Nations rather than to be essential to their Fellowship. Voluntary Law, as a matter of

[7] Droit des Gens, Préliminaires, § 21.

fact, ends where the Independence of Nations becomes imperilled, and it is not an optional matter to respect the liberty of individual Nations, when a disregard for that liberty would entail the dissolution of international Society.

Customary and Conventional Law.

§ 86. The identification of the Voluntary Law of Nations with the entire body of Instituted or Positive Law, and the employment of the term Voluntary Law to designate a *Genus*, of which Conventional and Customary Law are the *Species*, has been approved by the more distinguished American Jurists. Mr. Wheaton[8] observes, that it is almost superfluous to point out the confusion in Vattel's enumeration of the different species of International Law, which might easily have been avoided by reserving the expression Voluntary Law of Nations to designate the *Genus*, including all the rules introduced by *positive consent* for the regulation of international conduct, and divided into the two species of Conventional and Customary Law. To the same effect Mr. Justice Story has observed, "By the Law of Nations we understand not merely that portion of Public Law which is generally recognised amongst Nations, (as seems to have been the prevailing use of the phrase in the Roman Code,) but that portion of the Public Law which regulates the intercourse, adjusts the rights, and forms the basis of the Commercial and Political Relations of States with each other. Perhaps the most appropriate name would be International Law, *Jus inter Gentes*. It has in this view been correctly subdivided into three sorts, first, the *Natural* or *Necessary* Law of Nations, in which the principles of Natural Justice are applied to the intercourse between States; secondly, the *Customary* Law of Nations, which embodies those usages

[8] Elements of International Law, c. 1. § 9.

which the continued habit of Nations has sanctioned for their mutual interest and convenience; and thirdly, the *Conventional* or *Diplomatic* Law of Nations, which embraces positive compacts by treaties and conventions between Nations, and derives its sole obligation from the same sources as other contracts. Under this last head many regulations will now be found which had first resulted from custom or a general sense of justice, and are now made of positive obligation for the purpose of preventing National disputes and collisions[9]."

Identity of the Law of Nations with the Law of Nature, according to Hobbes and Puffendorf.

§ 87. The Natural Law of Nations is capable of being distinguished from the Law of Nature, which governs the mutual relations and the intercourse of individual human beings. Hobbes[10] and Puffendorf[11] have maintained the identity of the rules, which result from the natural relations of States, with those which result from the natural relations of individual men, considering Nations to be aggregate bodies of human beings, having in the mass rights and obligations, which differ only in *degree* from those which the individuals have in their several capacities. According to this view there is no distinct Science of the Law of Nations. But these writers in maintaining that Natural Law, such as it is in reference to individual human beings, is identical with the Natural Law which governs the intercourse of Nations, have not discriminated sufficiently between Law and the Principles of Right which are embodied in Law. The Principles of Right (Droit) are beyond doubt invariable, but the mode in which those principles are

[9] Story's Miscellaneous Writings, p. 536. "On the value and importance of Legal Studies."

[10] Hobbes, De Civ. *Imperium*, c. 14. § 4.

[11] Puffendorf, Law of Nature and of Nations, L. III. c. 3. § 23.

applied and developed undergoes infinite variations in accordance with the varying nature of the subjects to which they must be adapted. Law is, in fact, not an abstract principle of Duty or Right, but a System of applied principles.

The Law of Nations a special science according to De Wolff and Vattel.

§ 88. Barbeyrac, the translator and commentator both of Grotius and of Puffendorf, in combating the notion of a Positive Law of Nations, which he treats as "a chimæra," and in contending that the principles and rules of the Law of Nations are the same as those of the Law of Nature, is constrained to admit that there is a difference with respect to the mode in which those principles are applied in the two Laws[12]. De Wolff developed this doctrine more fully, perceiving that Nations were Composite Bodies, having in their collective capacities a Moral Being of their own, which in its nature and essence differed in many respects from the Moral Being of the individuals which composed the Nation[13]. Vattel followed in the direct track of De Wolff: "A State," he writes, "is a subject very different from an individual of the human race, from which circumstance, pursuant to the Law of Nature itself, there result in many cases very different obligations and rights, since the same general rules applied to two subjects cannot produce exactly the same decisions when the subjects are different, and a particular rule, which is perfectly just with respect to one subject, is not applicable to another subject of quite a different nature. There are many cases, therefore, in which the Law of Nature does not decide between State and State, as it would between Man

[12] Note on Grotius, De Jure Belli et Pacis, L. I. c. 1. § 14.

[13] Jus Gentium, Prolegomena § 3. Alia enim sunt principia Juris Naturæ, alia vero est applicatio eorundem ad Gentes, quæ diversitatem quandam parit in eo, quod infertur, quatenus natura Gentis non est eadem cum natura humana.

and Man. We must therefore know how to accommodate the application of it to different objects, and it is the art of thus applying it with a precision founded on right reason, which renders the Law of Nations a distinct and special Science [14].

Essential difference between Nations and Individual human beings.

§ 89. A Nation is essentially an Independent Political Society, whereas an individual human being is a Dependent Member of a Political Society. It is obvious therefore, that certain principles which may be applied absolutely to the intercourse of Nations by reason of their mutual independence, can only be applied *sub modo* to the intercourse of individual citizens; for instance, the principle of self-preservation is applicable to the mutual relations both of Nations and of individual human beings, but its application results in very different rules in the one case and in the other. Thus a Nation may freely confederate with other Nations against a common neighbour, but the principle of self-preservation may not be carried out in the same absolute manner by the individual members of a Political Society. What would be a perfectly lawful League in the case of Nations, might be an unlawful combination amongst individual citizens. Again, the principle of *suum cuique* is applicable in the most absolute manner to Nations, but its application to the individual members of a Political Society is modified by a variety of considerations arising out of the relations which have been established between the individuals and the Society of which they are members, and is conditional upon its adaptation to those relations.

The Law of Nature.

§ 90. Man is sometimes spoken of as living in a state of Nature when he is living under the rudest forms of physical life, and the law of his existence under such forms is by certain writers laid down to

[14] Droit des Gens, Préliminaires, § 6.

be the Law of Nature applicable to human beings. Such a view of the Law of Nature would indeed harmonize in substance with the *Jus Naturale of Ulpian*, who defines it to be that Law which Nature teaches all animals[16]. In a still looser sense men speak of the Law of Nature in regard to inanimate things. Thus it is said to be the Law of Nature that vegetables grow with their roots downwards and their stalks upwards, or to use the more accurate language of art, "that a seed in vegetating directs its radicle downwards and its plumule upwards." It is likewise said to be the Law of Nature that matter lighter than water floats upon its surface, as well as that water rises to the level from which it flows. But when men speak of the Law of Nature in this sense, they only mean to denote *an universal fact*, and the conformity of individual cases to the general rule is that which is said to constitute the Law of Nature. Thus the *Jus Naturale* of the Roman Jurists represents little more than a general fact traceable to the instinct of physical life, and the illustration which is given, e.g. *conjunctio maris et fœminæ*[17], is applicable to the vegetable as well as to the animal world.

Identical Natural Law of Rude and Civilised Nations.

§ 91. The Law of Nature, in the sense in which Writers on International Jurisprudence apply the term, corresponds in the main not with the *Jus Naturale* of the Roman Jurist, but with that division of law which is described in the Institutes[18], as "the law which Natural Reason teaches all mankind." Whether we regard man in a rude state of what is

[16] Jus Naturale, quod natura omnia animalia docuit. Inst. L. I. Tit. 11.

[17] Quod Naturalis Ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque Jus Gentium, quasi quo jure omnes gentes utuntur. Inst. L. I. Tit. 11.

[18] Just. Inst. L. I. Tit. 10.

termed savage life, or in a refined state of what is called civilised society, the one condition being equally *natural* with the other, the law which Reason suggests to him in either case will be equally the Law of Nature. It is accordingly not necessary to adopt a distinction which has been introduced by certain writers upon the authority of Von Ompteda [19] between the Absolute Natural Law and the Modified Natural Law.

Mr. Reddie [20] in commenting upon this subdivision of Natural Law, has happily observed, that the International Law of civilised Nations is as natural, and results as much from the legal relations actually existing in nature amongst those Nations as the International Law of rude Nations, and that as Von Ompteda rests his Modified Natural Law of States upon the general conviction of civilised Nations, there is really no ground for propounding it as a separate species of International Law distinct from what is viewed as the Primary Natural and Necessary Law of Nations.

Growth of the Positive Law of Nations.

§ 92. It was not until the Peace of Westphalia that sufficient materials were forthcoming for reducing into a system the *Positive* or *Instituted Law of Nations*. The principal writers during the Seventeenth Century had treated almost exclusively of the *Natural Law of Nations*, and the followers of Puffendorf, who expounded the Law of Nations entirely from the Law of Nature, were at the end of that Century the predominant school on the Continent of Europe. The contemporaneous English School of International Jurists was, on the contrary, always of a practical character. This was partly attributable to those common causes, whatever they may be, which

[19] Litt. des Völkerrechts, 1758. [20] Inq. in Internat. Law, p. 127.

give a peculiar practical turn to the course of English thought on all subjects, but it was partly due to the existence of a special jurisdiction in England which took cognizance of questions touching the *Jus inter Gentes*. It has been well observed by Mr. Chancellor Kent [21], in reviewing the growth of the existing system of International Law, that "many of the most important principles of public law have been brought into use and received a practical application, and been reduced to legal precision since the age of Grotius and of Puffendorf, and we must resort to the judicial decisions of the Prize Tribunals of Europe and in this country (the United States of North America) for information and authority on a great many points on which all the leading Text-Writers have preserved a total silence." From the Thirteenth to the Sixteenth Century, the controversies of Nations had been adjudged by the rules of the Civil Law, and Albericus Gentilis, the earliest Jurist who rendered any essential service to International Law as a Science, in his Treatise *de Jure Belli*, which appeared in England towards the close of the Sixteenth Century, supports his positions of law by reference to the Civil Law of the Romans, and appeals to the authority of the Commentators on that Law. Grotius himself has recourse to the rules and distinctions of the Roman Law, sometimes as illustrating the application of the principles of Natural Justice, at other times as supplying the best evidence of the usage of mankind, or at least of that which he conceived to be the most civilised portion of it. For instance, Grotius supported his position, that no Nation could acquire rights of property over the sea, so as to exclude others from fishing in it, by reference to the Roman Law, show-

[21] Commentaries on American Law, Part I. § 71.

ing from the Digest and the Text-Writers, that there had always been a rule founded on common consent in restraint of the Law of Nature with regard to prior occupancy, whereby the open sea was precluded from so being entirely reduced into possession by any Nation, as to found in it absolute and exclusive rights of property. "Wherever this Law of Nations is in force and has not been repealed by common consent, the most inconsiderable part of the sea, nay, though it be almost enclosed by the shore, can never be the property of any particular people [22]."

Study of the Law of Nations in England.

§ 93. The study of the Civil Law in England had always been fostered by the Universities of Oxford and Cambridge, at a time when the Courts of Westminster undervalued and disparaged it, and a privileged career was preserved for the Civilians in the High Court of Admiralty, where a knowledge of the Unwritten Law of the civilised World was of necessity maintained to meet the exigencies of the cases which might come before it. The threefold division of the Law of Nations into Natural, Conventional, and Customary, was adopted as early as the middle of the Seventeenth Century by Dr. Richard Zouch, who was at that time Judge of the High Court of Admiralty, and at the same time Regius Professor of Civil Law at Oxford. His Treatise on Fetial Law, or as he termed it, *Jus inter Gentes* [23], which appeared within a quarter of a century after the great work of Grotius, although small in bulk, was in substance very complete. His words are precise, "Cum multi diversis temporibus idem affirmant, id ad causam universalem referri debet, quæ alia esse non potest, quam recta conclusio

[22] De Jure Belli et Pacis, L. II. c. 3. § 10. 3.

[23] Juris et Judicii Fetialis, sive Juris inter Gentes, et quæstionum de eodem explicatio, anno 1650.

ex Naturæ principiis proveniens, aut communis aliquis consensus, e quibus illa Jus Naturæ indicat, hic Jus Gentium. Deinde præter mores communes, pro Jure etiam inter Gentes habendum est, id quod Gentes singulæ cum singulis inter se consentiunt; utpote per pacta, conventiones, et fœdera, cum communis reipublicæ sponsio legem constituat, et populi universi, non minus quam singuli, suo consensu obligentur." Dr. Zouch was the first to adopt the expression *Jus inter Gentes* in preference to that of *Jus Gentium*. In later times the Chancellor d'Aguesseau has suggested the substitution of the term *Droit entre Gens* for *Droit des Gens*. Neither of these modifications in the terminology of the Science has taken root, and it was reserved for Mr. Bentham in more modern times to suggest the phrase "International Law[24]," which bids fair to maintain itself in permanent use.

Courts of the Law of Nations.

§ 94. It has been the peculiar duty of the Tribunals of the Law of Nations to investigate with precision the *Jus Consuetudinarium*, and to separate the fluctuating institutions of particular Nations from the established practice of mankind. "It is my duty," says one of the most distinguished administrators of the Law of Nations, (Lord Stowell,) "not to admit, because one Nation has thought fit to depart from the common usage of the world and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely be-

[24] Heffter considers the term "International Law" not to express the idea of the Jus Gentium of the Roman Jurisconsults. The former he considers to be identical with the external Public Law of States; the latter he holds to embrace the mutual relations of individuals, as well as of States, so far as concerns their respective rights and obligations, having everywhere the same character and effect, independently of all positive institutions, § 1.

cause general theory might give it a degree of countenance independent of all practice from the earliest history of mankind. The institution must conform to the Text-Law and likewise to the constant Usage of the matter, and when I am told that before the present war, no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one Nation only in this war, I require nothing more to satisfy me that it is the duty of this Court to reject such a sentence as inadmissible[25]." The same accomplished Jurist has also noted on another occasion, how the practice of Nations controls the application of abstract principles. "It has been contended," he says, "that a sentence of condemnation passed before the tribunal of an ally upon a vessel lying in a neutral port is perfectly legal both on principle and authority. It is said, that on principle the security and condemnation of the capture are as complete in a neutral port, as in the port of the belligerent himself. On the mere principle of security it may perhaps be so, but it must be remembered that this is a matter not to be governed by abstract principles alone. The use and practice of Nations have intervened and shifted the matter from its foundation of that species. The expression which Grotius uses on these occasions, *placuit gentibus*, is in my opinion perfectly correct, intimating that there is an use and practice of Nations, to which we are now expected to conform[26]."

Customary or Consuetudinary Law of Nations.

§ 95. The *Jus Consuetudinarium* of Nations is to be gathered from a variety of sources. Ancient collections of Maritime Usages, such as are to be found in the Consolato del Mare and the Roles d'Oleron, supply

[25] The Fladoyen, 1 Robinson's Reports, p. 141.

[26] The Henrich and Maria, 4 Robinson's Reports, p. 54.

evidence of a very early practice. Thus the Rule that enemy's goods found on board of neutral vessels may be captured and condemned as Prize of War is supported by a long established practice, of which evidence has been recorded in the Consolato del Mare, c. 231[27]. On the other hand, a *consuetudo* may be inferred from a succession of Public Treaties, in which exceptions to it have been made for temporary purposes, or in which regulations have been agreed upon as to the manner of enforcing it. Thus there are numerous instances of Treaties since the middle of the Seventeenth Century, whereby Nations bound themselves to make exception towards one another in regard to the practice of confiscating the goods of an enemy found on board of the vessel of a friend. Such exceptions, however, were matters of Treaty-Engagement, and when the Treaty expired, the exceptional engagement ceased, and the general rule came into operation again. So likewise the *consuetudo* under which the Sound Dues were levied by Denmark upon all vessels passing into or out of the Baltic by the narrow seas of the Sound or the Belts, was matter of inference, as against the Nations of Europe, from a series of Treaties commencing in the Fourteenth Century, in which the European Powers have tacitly admitted the right of Denmark to levy tolls by negociating for and agreeing to a tariff of the tolls. Again, a *consuetudo* may be directly recognised by the European Powers in a formal Convention, such for instance as the Convention of London 13 July, 1841, whereby the Five Principal Powers of Europe recognised the ancient Rule of the Ottoman Porte to keep the passage of the Straits of the Dardanelles closed against foreign vessels of war, whilst the Ottoman

[27] Black Book of the Admiralty. Rolls Edition, vol. iii. p. 539.

Porte is at peace, and declared their unanimous determination to conform themselves to it. Again, a *consuetudo* may be inferred from the Ordinances of Princes on matters touching their relations with other Powers, where an uniformity of principles is observed to pervade them, and their enactments *in pari materia* are identical.

Relations with non-Christian Powers exceptional.

§ 96. Savigny[28] has observed, that "there may exist between different Nations a common consciousness of Right similar to that which engenders the Positive Law of a particular Nation. The foundation of this community of feeling rests partly on a community of origin, partly on common religious convictions; and upon this Community of feeling has been built up a Positive Law of Nations, as it especially exists amongst the Christian States of Europe. But this Positive Law of Nations, in his opinion, is only imperfect Positive Law; partly, on account of its indeterminate character; partly, because it has not that solid basis which the Power of the Government and the authority of the tribunals give to the Positive Law of particular States. The progress of Civilisation, grounded on Christianity, has led the Nations of Europe to observe a rule analogous to this Positive Law of Nations in their dealings with Non-Christian Powers, from whom they do not always expect a similarity of conduct; but this extended application of the rule is of a purely moral character, and is not in the nature of Positive Law." The Consuetudinary Law of Christendom has been accordingly not invoked as the governing rule of intercourse between Christian and Mahommedan Powers with the same absoluteness as between Christian Powers. In matters however of *substance*, and

[28] System des heutigen Römischen Rechts, L. I. c. II. § II.

where a primary question of International Right is involved, the European Powers have enforced against the Ottoman Porte and her dependencies on the Barbary Coast, the same rule of conduct which has been accepted amongst Christian Nations. "On many accounts," says Lord Stowell, "they are undoubtedly not strictly considered on the same footing as European Merchants; they may on some points of the Law of Nations be entitled to a very relaxed application of the principles established between the States of Europe, holding an intimate and constant intercourse with one another. It is a Law made up of a good deal of complex reasoning, although derived from very simple rules, and altogether composing a pretty, artificial system, which is not familiar to their knowledge or their observance. Upon such considerations, the Court has on some occasions laid it down that the European Law of Nations is not to be applied in its full vigour to the transactions of persons of the description of the present claimants, and residing in that part of the world, (i. e. Mahommedan merchants residing in the kingdom of Morocco.) But on a point like this, the breach of a blockade, one of the most simple and universal operations of war in all ages and countries, excepting such as are merely savage, no such indulgence can be shown. It must not be understood by them, that if an European army or fleet is blockading a town or port, they are at liberty to trade with that port. If that could be maintained, it would render the obligation of a blockade perfectly nugatory. They in common with all other Nations must be subject to this first and elementary principle of blockade. It is not a new operation of war; it is as old and general as war itself. The subjects of the Barbary States could

not be ignorant of the general rules applying to a blockaded port so far as concerns the interests and duties of neutrals[29]." But in a matter of *form* which involved only a secondary question of International Right, the same eminent Jurist upheld the transfer of a ship which had been captured by an Algerine Cruiser, and subsequently sold *bonâ fide* to a Christian Merchant, although it was not established that the ship had been formally condemned by the sentence of a Prize tribunal. The Court presumed from the fact that the sale was authorized by the State, and as no remonstrance had been made against it by the owner of the vessel, that there had been adequate grounds for the confiscation of the vessel according to their notion for some breach of Treaty-Regulations, "as it is by the Law of Treaty only that these Nations hold themselves to be bound, conceiving (as some other people have foolishly imagined) that there is no other Law of Nations, but that which is derived from Positive Compact and Convention[30].

The Diplomatic Science.

§ 97. The Conventional Law of Nations is sometimes spoken of as the Diplomatic branch of the Law of Nations, and Diplomacy, in accordance with this view, is the Science which is conversant with Negotiations and Treaties. This distinction has not been hitherto noted, and Diplomacy has been in general regarded merely as an Art. It must be admitted that the practice of Sovereigns in the selection of Diplomatic Envoys has given some colour to the prejudices of mankind against the very name of Diplomacy; and an able Diplomatist has come to be a proverbial designation for a skilful negotiator, who can bring about an arrangement *quocunque modo* in

[29] The Hurtige Hane, 3 Robinson's Reports, p. 325.
[30] The Helena, 4 Rob. p. 4.

favour of the party whose interests he represents. But Diplomacy as a Science has higher ends in view, and the true art of the Diplomatist is shown in easing the friction of International intercourse, and in smoothing the difficulties which may occasionally embarrass that intercourse, either by a candid interpretation of existing Treaty engagements, or by negociating the adjustment of a fluctuating practice upon a sound basis of Conventional Law. For this purpose, however, the Diplomatist requires not merely a technical knowledge of the general rules which govern the intercourse of Nations, but a perfect acquaintance with the principles involved in those rules, and which must be respected in the application of them; and it is indispensable for his success in administering the Law of Nations, that he should have mastered the elements of its Philosophy.

Conventional Law of Nations.

§ 98. "Treaties," it has been well observed by an American Statesman, "may be considered under several relations to the Law of Nations according to the several questions to be decided by them. They may be considered as simply repeating or affirming the General Law[31]: they may be considered as making exceptions to the General Law, which are to be a particular Law to the parties themselves: they may be considered as explanatory of the Law of Nations on points where its meaning is otherwise obscure or unsettled, in which case they are first a Law between the parties themselves, and next a sanction to the General Law, according to the reasonableness of the explanation, and the number and character of the parties to it: lastly, treaties may be

[31] The preambles or recitals of Treaties furnish sometimes valuable evidence in this respect, when they are against the interest of the party who makes them. Edinburgh Review, LXXVII. p. 312.

regarded as forming a voluntary or positive Law of Nations. Whether the stipulations of a treaty are to be considered as an affirmance, or an exception, or an explanation, may sometimes appear upon the face of the treaty; sometimes being naked stipulations, their character must be determined by resorting to other evidences of the Law of Nations. In other words, the question concerning the Treaty must be decided by the Law, not the question concerning the Law by the Treaty [32]." Mr. Madison's observations in the above passage are valuable, as they show that treaties may be operative in very different ways. For instance, the effect of a treaty, if it is of a restrictive character, must be limited to the parties between whom the compact is made; if on the other hand it should be of a beneficial character, and should relax the rigour of the customary Law in their mutual favour, its operation may extend to other Nations. But this indirect result will depend not upon the force of the Convention as a Contract, for *that* only binds the parties to it, but on certain considerations of Right (Jus) *dehors* the treaty; and which may involve the nicest questions of International Jurisprudence.

Views of Martens and others contrasted.

§ 99. Mr. Reddie, in his Inquiries in International Law [33], has suggested, that German writers generally, and particularly Martens and Klüber, have, in framing or constructing the science which they have denominated *Droit des Gens Moderne de l'Europe*, ascribed too much to express Conventions or Treaties, as sources of this Law. Their language [34] is considered by him to imply, that besides the obligation which

[32] Madison's Examination of the British Doctrine, London, 1806, p. 39.

[33] Reddie, Inquiries in International Law, pp. 157, and 339.

[34] Martens, Précis du Droit des Gens, Introduction, § 7. Klüber, Droit des Gens, § 2.

Treaties impose upon the immediate parties to the contract, some more General Law may be gathered from them, resulting from a concurrent mode of contracting, which will be binding upon Nations which are not parties to the treaties. "It is obvious, however, that no Common or General Law of Nations can be derived from the particular Treaties or Conventions of Nations, however similar they may be. Those treaties can be used for the construction of the Science, only in order to ascertain what has been propounded or recognised in them as their basis, and that basis is nothing else than Custom or Usage." Such is the reply which is given by an opposite school of writers represented by the Prussian Privy Councillor Schmalz [35], and by the anonymous author of the Traité Complet de Diplomatie. The former writer observes that Leibnitz, whose Codex Diplomaticus may be regarded as the foundation of the Diplomatic Science, "commenced his collection of treaties not with the idea that the contents of these treaties would supply a body of International Law, but because there would be found in them pre-eminently what principles the European Powers have recognised as right and just, or what they have pronounced or held to be so recognised, and to be unquestionable." The author of the Traité Complet de Diplomatie in a similar manner says, "Cependant il est évident, qu'on ne sauroit former un droit positif de l'ensemble des Conventions particulières des peuples, quelque semblables qu'elles fussent. Ces pactes ne peuvent servir de matériaux pour édifier la science, s'ils ne montrent ce que l'on y a reconnu pour base ; et cette base n'est autre chose, que la coutume [36]."

[35] Schmalz, Europäisches Völkerrecht, B. I. § 10. and § 28.

[36] Traité Complet de Diplomatie, T. I. p. 41.

The difference is important between these two schools of Jurists. The former regard the principles as commending themselves to our acceptance by reason of their recognition in the treaties; the latter consider the treaties to demand our respect, so far as they furnish evidence of a very general and long prevailing usage.

Ortolan's view of the effects of Conventions on General Law.

§ 100. M. Ortolan in his work on the Diplomacy of the Sea[37], has combated Mr. Reddie's criticisms, and has vindicated the doctrine of Martens and Klüber, from what he considers to be a misapprehension of its true import. M. Ortolan holds that those eminent publicists did not pretend that the stipulations of a particular treaty could be a rule binding upon any but the parties to it, but that a series of treaties concluded at different epochs between different civilised Nations, exhibited an uniformity of principle in their stipulations, from which a theory of what is generally practised amongst Nations may be formed by abstraction, and this theory constitutes *the Conventional Law of Nations*. M. Ortolan then proceeds to cite a passage from one of the authors criticised by Mr. Reddie, in which it is contended that "the principle which is established in the greatest number of treaties ought to be regarded as the rule, and that which is found in the least number as the exception. That the question in dispute ought to be decided according to the principle contained in the greatest number of treaties, particularly if the greatest number are at the same time the most recent. For it may be inferred from this circumstance, that Nations have gradually abandoned an old principle for a new principle, and that

[37] Règles Internationales et Diplomatie de la Mer, Tom. II. Appendice, p. 442.

by a change of principles they have worked a change in the Law of Nations."

Wheaton's earlier and later views.

§ 101. Wheaton, in a similar manner, in the earlier editions of his Elements of International Law, seems to have been inclined to assign to treaties too important a part in the formation of General International Law. "The effect of Treaties and Conventions between Nations," he observes, "is not necessarily restricted, as Rutherforth has supposed, to those States which are direct parties to these compacts. They cannot, indeed, modify the original and preexisting International Law, to the disadvantage of those States which are not direct parties to the particular treaty in question. But if such a treaty (1) *relaxes the rigour of the primitive Law* of Nations in their favour, or (2) is merely declaratory of the preexisting Law, or (3) furnishes a *more definite rule* in cases where the practice of States has given rise to conflicting pretensions, *the Conventional Law thus introduced is not only obligatory as between the contracting parties, but constitutes a rule to be observed by them to all the rest of the world*[38]. In support of this view, Wheaton refers to his History of the Law of Nations, and the remarks therein contained upon the Maritime Convention concluded in 1801 between Russia and Great Britain, which put the seal to the dissolution of the Second Armed Neutrality of the Baltic Powers[39].

Convention of 1801 between Russia and Great Britain.

A difficulty at once suggests itself in the way of the first and third of Wheaton's positions, namely, that as International obligations are under the Common Law of Nations reciprocal, if a State under

[38] Elements of International Law, third edition, Philadelphia, 1846, part I. c. 1. s. XVI. § 7.

[39] History of the Law of Nations, p. 14. § 9. pp. 408—420.

treaty-engagements with one Power, which come under either of those heads, is bound by the Common Law of Nations to observe the rule which accords with those treaty-engagements, not merely in its intercourse with that Power, but in its intercourse with all other Powers, those other Powers will be bound to reciprocate the rule, and they will thus be indirectly involved in engagements to which they are not consenting parties. This anomaly will be still more striking in the case, where the treaty-engagements are on a subject, "where the practice of different States has given rise to conflicting pretensions," and the States which are not parties to the treaties should be those which pursue a different practice from that, which the treaty has introduced between the contracting parties.

Illustration as to Contraband of War.

§ 102. In regard to Wheaton's second position, the Law of Contraband of War may be referred to by way of illustrating his mode of applying the principle. By the third section of the third Article of the Convention of 1801, Great Britain and Russia agreed to the same definition of Contraband of War which had been agreed upon between the two Powers in the temporary Convention of 1797. Wheaton[40] observes that this section does not contain "the concession of any special privilege to be thenceforth enjoyed by the contracting parties only, but the *recognition of an universal and preexisting right,* which, as such, could not justly be refused to any other Independent State," and that "it must be taken as laying down a general rule for all further discussions with any power upon the subject of Military and Naval Stores, and as establishing a principle of law which was to decide universally on a just interpre-

[40] History of the Law of Nations, p. 415, 416.

tation of the technical term of Contraband of War."

Bynkershoeck's doctrine.

The doctrine of Bynkershoeck[41] does not harmonize with Wheaton's view, for Bynkershoeck holds, that there is a Common Law of Nations as to Contraband of War, which has been deduced from reason and usage, and *the usage of mankind* is evidenced by the tenor of an almost perpetual series of treaties and ordinances on the subject.

There is also a reservation contained in the concluding part of the third Section of the third Article of the Convention of 1801, which seems to be irreconcilable with Wheaton's Interpretation. It is agreed that the stipulations of the present Article shall not prejudice in any way the particular stipulations of either Crown with other Powers; whereby objects of a like kind shall be reserved, prohibited, or permitted[42]! Wheaton considers this clause to apply only to subsisting treaties, and contends that its insertion countenances his construction of the Article, inasmuch as it was necessary for Great Britain, when she undertook to lay down an universal principle, applicable to all her transactions with every Independent State, to reserve the *more favourable* practice which her *subsisting* treaties had established with some other Powers. But the words of the Article seem to bear a more extensive meaning, and apply rather to *contingent* than to *subsisting* treaties, and are not limited necessarily to treaties more favourable to

[41] Questiones Juris Publici L. I. c. 10. "Dixi ex perpetuâ quodammodo consuetudine paciscendi edicendique, quia unum forte alterumve pactum quod a consuetudine recedit, jus Gentium non mutat."

[42] "Il est aussi convenu, que ce qui est stipulé dans le présent article, ne portera aucune préjudice aux stipulations particulières de l'une ou de l'autre couronne avec d'autres puissances, par lesquelles des objets de pareil genre *seroient réservés, prohibés* ou *permis*." Martens, Recueil, VII. p. 262.

Great Britain, as it speaks of Treaties which should *permit*, as well as of those which should *prohibit* similar objects.

It was unnecessary for the two Powers to declare that this treaty should not prejudice the *subsisting* treaties of Great Britain with other powers, excepting *ex majori cautelâ*, to prevent any possible question between them on the subject; for Great Britain could not set aside, under any circumstances, her Treaties with other Powers on the subject of Contraband of War, on the grounds that she had concluded a Treaty on other terms with Russia. On the other hand, this *proviso* would have been idle, had there been any principle of the Common Law of Nations which entitled any third Power to insist upon Great Britain and Russia observing towards itself a rule which accorded with their particular Treaty-engagements. In further illustration of the untenable nature of Wheaton's positions in regard to the particular subject of Contraband of War, the practice of Nations may be appealed to. Thus Great Britain during the war of the Spanish Succession made a Treaty with Denmark, under which ship-timber was recognised between the Two Powers as Contraband of War, and not to be imported into the enemy's port. France, being at such time at war with England, did not claim from Denmark, under the Law of Nations, the observance of a like rule in her favour, but insisted upon Denmark concluding an analogous Treaty with the French Crown. Such a measure would have been unnecessary, if the Law of Nations had bound Denmark to observe the same rule as to Contraband of War towards the enemies of other Powers with which she was at amity, as she had engaged herself by Treaty with Great Britain to observe towards the enemies

of that Power. Yet there is no subject which concerns so intimately the interests of every Member of the Family of Nations, as the rights and obligations of Neutrality. Again, if the rule of Law was such as has been suggested by Wheaton, we should not find a special provision in treaties to the effect that the contracting party shall grant to each other the same immunities and privileges which they should grant to any other Nation, in other words, what is termed "the most favoured Nation clause." But this subject will be more fully discussed when we come to speak specially of Conventions. Meanwhile it may be useful to remark, that the Plenipotentiaries of the Seven Powers assembled in Congress at Paris on 16th April, 1856, who signed the Declaration respecting Maritime Law in time of War, with a view to establish an uniform doctrine and more beneficial practice, agreed to bring it to the notice of the States which did not take part in the Congress, and to invite them to accede to it. The Declaration was meanwhile to be binding only between the Powers who had acceded to it. But this *proviso* is idle, if Wheaton's Theory be correct, that the Conventional Law thus introduced, seeing that it relaxes the rigour of the primitive Law of Nations, and at the same time furnishes "a more definite rule in a case where the practice of states has given rise to conflicting pretensions," is not only binding on the contracting parties, but "constitutes a rule to be observed by them to all the rest of the world." The United States of North America, for instance, have been formally invited to accede to the Convention of Paris, but they have declined so to do, unless the European Powers will agree to modify still further their practice as to Prize of War on the High Seas. The remaining

Declaration of Maritime Law at Paris, 16 April, 1856.

Powers of Europe who were not parties to the original Declaration, have since formally acceded to it[43].

Preambles and Recitals of a Declaratory Character.

§ 103. There may be exceptional cases in which articles of a Declaratory character are inserted in the Text of Public Acts of an International character, by the side of articles which are strictly the foundation of a Contract, and those Declaratory articles may apply to all Nations. Thus in the Final Act of the Congress of Vienna (9 June, 1815) several Declaratory Acts of one or more of the Powers assembled in Congress were in substance incorporated in the form of Articles, or formally recognised as if annexed *in extenso*. Amongst these the 109th Article may be specially referred to as *expressly* applicable to all Nations, which declares the navigation of all rivers, which traverse or separate the territories of the Powers which have signed the Treaty, to be *free to all the world*. "La navigation dans tout le cours des rivières indiquées dans l'article précédent, du point où chacun d'elles devient navigable jusqu'à son embouchure, sera entièrement libre, et ne pourra, sous le rapport de commerce, être *interdite à personne*, bien entendu que l'on se conformera aux réglemens relatifs à la police de cette navigation, lesquels seront conçus d'une manière uniforme pour tous, et aussi favorable que possible au commerce de toutes les Nations[44]." The Regulation, on the other hand, respecting the

[43] It is most satisfactory to find, that in the last (sixth) edition of Wheaton's Elements, (Boston, 1857,) edited after his death by Mr. William Beach Laurence, the objectionable doctrine which has been discussed in the preceding sections is no longer maintained. The passages which appear in the earlier editions, and which contain the reference to Mr. Rutherforth's work, as well as Wheaton's three positions, are discarded, and their place is supplied by some general remarks which are more in accordance with the doctrine of Bynkershoeck.

[44] Martens, Nouveau Recueil, II. p. 427.

rank of Diplomatic Agents which was incorporated in the General Act[45], is an instance of a provision *virtually* applicable to all Nations, but the Powers which agreed to the Regulation were extremely careful to disclaim any right to impose it upon other Powers. Again, in the Treaty of Paris, (30 March, 1856), Article XV is to this effect: "The Act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different States, the Contracting Parties stipulate amongst themselves that those principles shall in future be equally applied to the Danube and its mouths. They declare that this arrangement henceforth forms *part of the Public Law of Europe*, and take it under their guaranty."

Objections to the idea of any Law, as such, between Nations.

§ 104. Certain writers, both in England and in France, have expressed a doubt how far the Rules of conduct which prevail amongst Nations can properly be regarded or spoken of as Laws, on the ground that they are not prescribed by any superior Power. Thus Mr. Austin says[46], "that the Law of Nations obtaining between Nations is not Positive Law, for every Positive Law is set by a given Sovereign to a person or persons in a state of subjection to its author." He observes further, that, "the law obtaining between Nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions; by fear on the part of Nations, or by fear on the part of Sovereigns of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." Mr. Austin accordingly considers that the science which is conversant with the positive rights and obligations

[45] Art. CXVIII. [46] Austin on Jurisprudence, p. 208.

of Nations should be styled the science of Positive International Morality. To a similar effect M. de Rayneval writes[47], "there can be no right (droit) where there can be no law (loi), and there is no law where there is no Superior; without law, obligations, properly so called, cannot exist; there is only a moral obligation resulting from natural reason; such is the case between Nation and Nation." He further says, that "law is a rule of conduct, deriving its obligation from sovereign authority, and binding only on those persons who are subject to its authority. Nations being independent of one another acknowledge no Sovereign from whom they can receive Law (loi), and all their relative duties result from right or wrong, from convention or usage, to none of which can the term Law be properly applied."

Internationa Morality distinct from the Law of Nations.

§ 105. It is however not a valid objection to the existence of juridical relations between Nations, that they are not, like the domestic law of a State, defined by the Sovereign Power, or that they are not enforced by the executive authority of a political Superior. If those relations can be accurately defined howsoever, and can be enforced at all, they are not merely relations of Morality, but relations of Law. The History of the European Law of Nations shows that the more powerful Nations have, as occasion required, used their individual strength to enforce its rules, and that the less powerful Nations have combined their forces from time to time, and by their united strength compelled the more Powerful States to respect them. Such leagues for the enforcement of the reciprocal rights and obligations of Nations have been the means of maintaining a Balance of Power amongst the European

[47] De Rayneval, Institutions du droit de la Nature et des Gens, L. I. p. 8. n. 10.

Nations, whereby the independence of the weaker states is protected from aggression, and the observance of settled rules of intercourse amongst Nations is secured. Wherever a Rule of Conduct is thus capable of being enforced it ceases to be a mere Rule of Morality, binding on the *conscience of men*, and may in contradistinction be termed without risk of confusion a *Rule of Law*[48]. There are, however, many questions between Nations which involve matters of International Morality, and the Rules of International Morality[49] are supplemental to the Rules of International Law. Law may prevent wrong, but it cannot always secure right, and Morality here steps in to the aid of Law between Nations, precisely as it comes to the aid of Law between individual human beings. Mr. Chancellor Kent has well observed, "that the Law of Nations is a complex system, composed of various ingredients; it consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of Nations; of a collection of usages and customs, the growth of civilisation and commerce; and a code of Conventional and Positive Law. In the absence of these latter regulations, the intercourse and conduct of Nations are to be governed by principles fairly to be deduced

[48] It appears to be a well founded distinction between *Law* and *Morality*, that wherever the sanctions of a rule of conduct are *Physical*, namely, wherever the sanction is fear of injury to person or property, the rule may be properly ranked under the head of Law; where the sanctions of a rule of conduct are only to be discovered in the human conscience, it is a rule of Morality as distinguished from Law.

[49] Mr. Senior proposes to distinguish the Natural Law of Nations by the term International Morality, and to confine the term International Law to the rules of conduct, whether consistent or not with International Morality, which are sanctioned by the public opinion of Nations. Edinburgh Review, LXXVII. p. 306.

from the rights and duties of Nations and the nature of moral obligations; and we have the authority of lawyers of antiquity, and some of the first masters in the modern school of Public Law, for placing the moral obligation of Nations and of individuals on similar grounds, and for considering individual and national Morality as parts of one and the same Science [50]."

[50] Kent's Commentaries of American Law. Part I. Lecture 1.

CHAPTER VII.

RIGHT OF SELF-PRESERVATION.

Absolute and Conditional Rights of Nations—Right of Self-Defence—Treaty Limitations of such Right—Right of Self-Aggrandisement—Right of anticipating Attack—Right of Confederation—The Balance of Power.

Absolute and Conditional Rights of Nations.

§ 106. EVERY Nation has certain rights with regard to other Nations, which pertain to its moral being as an Independent Political Body, and the enjoyment of which is indispensable to its existence as such. These Rights may be termed Primary and Absolute Rights[1], as they are coordinate with the Being of a Nation, and are not dependent upon particular conditions of International Life. There are other rights to which all Nations are entitled, but not under all circumstances, which arise out of the intercourse of Nations with one another, and which cease with the circumstances which give rise to them. These may be distinguished as Secondary or Conditional Rights, some of them being incident to a state of amity, others being coincident only with a state of war. The Primary or Absolute Rights of Nations rest upon a foundation of Moral Truth, "the proofs of which are to be referred to some such certain notions," to use the language of Grotius[2], "as none can deny without doing violence to his own judgment." The Secondary or Conditional Rights rest upon a basis of historical fact. The former are inseparably connected with the free Moral agency of Independent Political Bodies, the

[1] Klüber, § 36. Wheaton, Elements, pt. II. c. 1. § 1.
[2] De Jure Belli et Pacis, Prolegomena, § 39.

latter have grown up with the exercise of that free Moral agency, and with the mutual recognition of its consistency with the varying circumstances of International intercourse.

Right of Self-Defence.

§ 107. Of the Primary or Absolute Rights of a Nation the most essential, and as it were the Cardinal Right, upon which all others hinge, is that of Self-Preservation. This Right necessarily involves, as subordinate Rights, all other Rights which are essential as means to secure this principal end. Amongst these, the foremost is the Right of Self-Defence. An Independent Political Society, which is not in a condition to repel aggression against its Territory, or against the Persons or Property of its Members, is unequal to the object of its Institution. "The Nation," writes Vattel [3], "ought to put itself in such a state as to be able to repel and humble an unjust enemy. This is an important duty which the care of its own perfection and even its Self-Preservation imposes both on the State and on its Conductor." Hence a Nation is entitled, consistently with the maintenance of peaceful relations towards other Nations, to fortify its Territories, to train up its Population generally in the use of arms, to maintain a portion of its Population under arms, in the form either of a standing army or a permanent war-navy, to equip itself with stores and munitions of war, and to form defensive alliances with other Nations. The presumption of Natural Law is, that all measures of this kind which do not endanger the safety of other Nations, are undertaken *bonâ fide* for the security of National Independence, and the exercise of the Natural Right of a Nation in these matters is only controlled *de jure* by the equal and corresponding Rights of other Nations. "A Nation," writes Vattel [4], "is

[3] Droit des Gens, L. I. c. 14. § 177.

[4] Ibid. § 185.

sufficiently powerful, when it is capable of causing itself to be respected, and of repelling whoever would attack it." Within these limits no Nation is bound to give account of its conduct to any other Nation. But the equal and corresponding Rights of other Nations come at once into play, if a Nation should increase its armaments to an extraordinary extent. Under such circumstances, any other Nation, in pursuance of its own right of Self-Defence, may ask for explanation, if it either sees in the armaments of its Neighbour immediate occasion for alarm, or anticipates possible danger to itself or its Allies. A refusal to furnish explanation, when it has been asked for in a courteous tone and with an amicable spirit, will justify counter-armaments, and may sometimes even justify immediate measures of hostile repression [5].

Treaty Limitations of Right of Self-Defence.

§ 108. Exceptional cases occur *de facto*, in which the limits, within which a Nation may lawfully exercise its Right of Self-Defence, have been narrowed by special conventions freely entered into with other Nations.

Thus the exercise of the Right of a Nation to fortify its territory has been sometimes limited by treaty-engagements. In such cases the exercise of that Right by the erection of fortifications of a particular kind has been deemed to be inconsistent with the safety of another Nation. Thus by the Treaty of Utrecht, (anno 1713,) confirmed by the subsequent treaties of Aix-la-Chapelle, (anno 1748,) and of Paris, (anno 1763,) France engaged herself to Great Britain not to fortify the town of Dunkirk towards the sea, as such fortifications were deemed by Great Britain to be inconsistent with her just security. By the treaty of

[5] Klüber, Droit des Gens, 118; Wheaton's Elements, part § 40; Martens, Précis, § 117, II. c. 1.

Luneville[6], (anno 1801,) France restored to the Princes of the Germanic Empire all the conquests which her armies had made on the right bank of the Rhine, on the express condition however, that the ceded fortresses should continue permanently in the state in which they were at the time of their evacuation by the French armies. By the Treaty of Paris, (anno 1815[7],) France engaged herself to the Allied Powers not to rebuild the Fortifications of Huningen, which had been a source of disquietude to the City of Bâsle, and not to replace them by any other Fortifications at a distance of less than three miles from that city. Again, the exercise of the Right of a Nation to maintain a portion of its population under arms, has been subjected to limitation by treaty-engagements, more particularly with regard to a war navy. Thus the Genoese in their Treaty with France, (anno 1683,) undertook to reduce the number of their vessels of war in commission, and the Ottoman Porte and Russia respectively engaged themselves to the European Powers who signed in conjunction with them the Treaty of Paris[8], (anno 1856,) by a special Convention annexed to that Treaty, and declared by Article XIV of that Treaty to form part of it, not to maintain severally more than ten vessels of war of a limited tonnage on the waters of the Black Sea[9].

Right of Self-Aggrandisement.

§ 109. A Nation is not entitled to oppose itself to the territorial aggrandisement of another nation, unless that aggrandisement be actually prejudicial to its rights, or visibly threatens to become so[10]. War is not

[6] Martens, Recueil, vii. p. 296.

[7] Martens, Nouveau Recueil, II. p. 682.

[8] Martens, N. R. Gén. XV. p. 786.

[9] This Convention was abrogated with the consent of all the Signatory Powers of the Treaty of Paris at the Conferences of London, January 17, 1871.

[10] Grotius de Jure Belli et Pacis, L. II. c. 1. § 17. Wolff, Jus Gentium, § 640.

justifiable on any other ground than that of redressing actual wrong, or of preventing intended aggression. A Nation, which by any just means enlarges its dominions by the incorporation of new Provinces with the free will of their inhabitants, or by the occupation of vacant territory to which no other Nation can lay claim, is pursuing the legitimate object of its Being, as a Political Society instituted for the promotion of the common welfare of its members[11]. "A State," writes Vattel, "that increases her power by all the acts of good government, does no more than what is commendable: she fulfils her *duty towards herself* without violating those which she owes to other Nations[12]." "The right of every Independent State," writes Mr. Wheaton, "to increase its national dominions, wealth, population, and power, by all innocent and lawful means—such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force—is an incontrovertible right of Sovereignty, generally recognised by the usage and opinion of Nations." All writers on Public Law[13] agree that an increase of Power cannot alone, and of itself, give any Nation a right to take up arms in order to oppose it. The internal development of the resources of a country, although the increase of its population and wealth is the surest means of augmenting its power, has never yet been considered a just cause of alarm to other Nations, for such augmentation is in perfect accordance with the moral end of a Nation's Being,

[11] Klüber, § 41.
[12] Droit des Gens, L. III. c. 3. § 42.
[13] Elements of International Law, pt. II. c. 1. § 3.

and, being gradual, is not suggestive of any evil intention towards others. In the same way the settlement of Colonies in distant lands, and the acquisition of Dependencies in remote quarters of the world, have been regarded as legitimate means of external development, which a Nation may pursue without giving to other Nations just cause of apprehension for their own safety. It would be contrary to Morality for Nations to combine for the purpose of retarding the innocent growth of the power of a State, which owing to the superior merits of its Political Institutions, or through the enlightened guidance of wise rulers, is enabled to advance more rapidly in the career of civilisation than its neighbours, and, as a consequence of such advance, to attain to greater material prosperity. The usage of Nations in this respect accords with the dictates of right Reason.

Right of anticipating attack.

§ 110. On the other hand, an increase of power, if it be accompanied by the will to abuse that power, creates good ground for alarm, and may justify a recourse to arms[14]. "A Nation," writes Vattel, "which has a neighbour at once powerful and ambitious, has her all at stake. As men are under the necessity of regulating their conduct in most cases by probabilities, those probabilities claim their attention in proportion to the importance of the subject; and, to make use of a geometrical expression, their right to obviate a danger is in a compound ratio of the degree of probability and the greatness of the evil threatened. If the evil in question be of a supportable nature, if it be only some slight loss, matters are not to be precipitated; there is no great danger in delaying our opposition to it, until there be a certainty of our being threatened. But if the safety of the

[14] Wolff, Jus Gentium, §§ 651, 652.

State lies at stake, our precaution and foresight cannot be carried too far[15]." Accordingly, as experience shows that there is in human nature a tendency to abuse power wherever it may be done with impunity, the circumstance, that the possession of power is generally accompanied with the will to abuse it, entitles a State, when its safety is at stake, to treat the first appearance of such a combination of power and will as a sufficient warning[16]. Further, if a Nation has exhibited unmistakable signs of undue ambition or rapacity, she becomes an object of suspicion to her neighbours, whose duty it is to stand their ground against her, and if she is at any moment on the point of acquiring a formidable accession of power, they may demand securities from her, and if she hesitates to give them, they may prevent the probable danger to themselves by force of arms[17]. When the safety of the State is at stake, the Right of Self-Preservation may warrant a Nation in extending its precautionary measures beyond the limits of its own dominions, and even in trespassing with that object on a neighbour's territory. As the Right of Self-Preservation is prior and paramount to the Right of Dominion and Property in the case of individuals, so the Right of Self-Preservation is prior and paramount to the Right of Territorial Inviolability in the case of Nations[18], and if ever these Rights conflict, the former is entitled to prevail within the limits of the necessity of the case[19]. Thus, if a Nation takes possession

[15] Droit des Gens, Lib. III. c. 3. § 44.

[16] Potentia igitur crescens in hoc casu non modo inter rationes suasorias locum habet, sed in ipsas quoque justificas influit, quatenus abusus potentiæ non amplius dubius. Wolff, § 650.

[17] Vattel, L. III. c. 3. § 49, 50.

[18] Phillimore, Tom. I. § 214.

[19] Genti unicuique competit jus ad ea quibus periculum interitus avertere et ea, quae interitum afferre possunt, vitare potest, quantum datur. Wolff, Jus Gentium, § 34.

of another Nation's territory with a view to conduct hostile operations against a third Nation, the third Nation may in virtue of its Right of Self-Preservation lawfully pass the frontier of the territory, which has been so occupied, for the purpose of dislodging its enemy from it. Urgent and indisputable danger may even authorise a Nation to occupy the territory of a neutral Nation, in order to prevent the execution of an enemy's intention to occupy it for the purposes of carrying on its hostilities with greater advantage, whenever the Nation to which the territory belongs is unable or unwilling to defend it. But the exercise of this Right, which Klüber[20] regards as a Right of Necessity, entails the obligation to make compensation to the neutral State for any damages which may have accrued to it[21].

Right of Confederation.

§ 111. Two or more Nations have a right to unite themselves into one Independent Political Body, so as to become one Nation, provided the views, by which they are so actuated, be not prejudicial to other Nations. But if each of the Nations in question be able separately and without assistance to govern and support itself, and to defend itself from insult and aggression, it may be reasonably presumed, that the object of their union is to obtain dominion over their neighbours, and on occasions where it is impossible or too dangerous to wait for an absolute certainty, other Nations will be justified in acting on a reasonable

[20] Klüber, Pt. II. § 44.

[21] Extreme necessity may even authorise the temporary seizure of a neutral town, and the putting a garrison therein, with a view to cover ourselves from the enemy, or to prevent the execution of his designs against that town, when the sovereign is not able to defend it. But when the danger is over, we must immediately restore the place, and pay all the charges, inconveniences, and damages, which we have occasioned by seizing it. Vattel, L. III. c. 3. § 122.

presumption, and may forthwith have recourse to measures of Self-Defence. On these grounds, Vattel[22] maintains, that the Nations of Europe would have been justified in combining together against Louis XIV of France, if he had attempted to unite the Monarchy of Spain to that of France; for to have tamely suffered an union of the two Monarchies in the person of a Prince who had already given proofs of imperious pride and insatiable ambition, "would have been, according to all the rules of human probability, equivalent to surrendering the rest of Europe into servitude, or at least would have rendered the condition of each European State too critical and precarious to be endurable by Independent Political Bodies. The safety, therefore, of the other Nations of Europe would have justified them in opposing by anticipation such a formidable accession to the power of so ambitious a Prince." The right is still clearer, if a formidable Power should betray an unjust and ambitious disposition by doing the least injustice to another Power[23]. "In such a case, all Nations may avail themselves of the occasion," writes Vattel, "and by joining the injured Party thus form a Coalition of strength, in order to humble the ambitious Potentate, and disable him from so easily oppressing his neighbours, or keeping them in continual awe and fear. For an injury gives to the injured Party a right to provide for his future safety by depriving an unjust Aggressor of the means of doing injury, and it is lawful and even praiseworthy to assist an injured Party, and to aid him in obtaining redress and in protecting himself from injury[24]." The supreme arbitrator between Nations is the sword, but force of arms is not

[22] Droit des Gens, L. III. c. 3. § 44.

[23] Wolff, Jus Gentium, § 651.

[24] Vattel, L. III. c. 3. § 45.

the only expedient by which Nations may guard themselves against a Formidable Power. There is a moral sanction to the mutual duties of Nations, in the fear of provoking general hostility and incurring its probable evils, in case a Nation should violate the Common Law; and these mutual sanctions are enhanced by the formation of Confederacies amongst the less powerful Nations for the purpose of maintaining the Balance against a Nation, whose Power causes them alarm[25].

The Balance of Power.

§ 112. The Right of Confederacy under the Natural Law of Nations is at the foundation of the Right of Intervention in the interest of what has been termed, since the Peace of Utrecht, (anno 1713,) the Balance of Power. The System of Balance, or European Equilibrium, is a creation of Positive Law. The outlines of the System may be discovered in the Provisions of the Treaty of Westphalia, (anno 1648,) and of the Treaties of Copenhagen, (anno 1648,) and of Oliva, (anno 1660,) but the express recognition of the System of Balance, as a rule of Positive Law, dates from the Treaties of Utrecht, (anno 1713,) concluded expressly according to the recital in the Treaty between Great Britain and Spain, "Ad formandam stabiliendamque pacem ac tranquillitatem Christiani orbis Justo Potentiæ Æquilibrio[26]." The maintenance of the Balance of Power in Europe is expressly set forth in the Acts of Renunciation to the Crown of Spain executed by the French Princes of the House of Bourbon, which are inserted in the body of the Treaties of Utrecht, as the motive cause of their Renunciation. The European System of Positive Law may be said to have rested upon the Treaties

[25] Wolff, Jus Gentium, § 652. Klüber, § 42.

[26] Schmauss. Corp. Jur. Gent. Academicum, p. 1419.

of Utrecht down to the French Revolution, (anno 1789,) although during that period various elements were introduced into that System, which were calculated to derange the Balance of Power established at Utrecht. The wars of the French Revolution crumbled that System into atoms, and one main object of the Congress of Vienna, next only to that of settling a General Peace, was to secure the maintenance of the repose of Europe by a readjustment of the Balance of Power. The intentions of the Allied Powers in this sense had been avowed by them in the Preamble of the Convention of Paris (23 April, 1814)[27]. That the Balance of Power is a principle at the foundation of the Positive Law of Europe, and that the Powers which were Parties to the Treaties of Vienna acted upon that principle in framing the Great European Settlement of 1815, has been recorded by the Five Powers in several important International Acts. Thus the Five Great Powers, which were Parties to the Treaty of Paris, having been invited by the King of Holland to assist him in the settlement of the disturbed relations between the Belgian Provinces and the Dutch Crown, placed formally on record their view of the grounds which justified their Intervention. Having expressly stated[28], that the original object of uniting the Belgian Provinces with Holland was to establish a *Just Equilibrium* in Europe, they proceed to say that the Five Powers had a right, and that events imposed upon them a duty, to prevent the Belgian Provinces, as an Independent State, causing any disturbance of the general security and the European

[27] Martens, N. R. I. p. 706.

[28] Nineteenth Protocol of the Conferences of the Five Powers, (19 Feb. 1831.) Martens, N. R. X. p. 197. British and Foreign State Papers, XVIII. p. 779.

Equilibrium. The same principle was affirmed in the Treaty of London (8 May, 1852)[29], concluded between the Five Powers and Sweden on the one hand, and the King of Denmark on the other hand, in recognition of the establishment of an order of Succession in the Danish Provinces of the Monarchy, which should harmonize with that already existing in the German Duchies. It was on that occasion formally declared, "that the maintenance of the integrity of the Danish Monarchy was intimately connected with the general interests of the European Equilibrium." The same principle was relied upon by the Governments of Great Britain and France, when they protested in 1851 against the proposed incorporation of any non-German States into the Germanic Confederation[30], as a derangement of the European Equilibrium. The last great occasion for the recognition of the principle of the Balance of Power, as lying at the foundation of that branch of the Positive Law of European Nations, which may be termed the Public Conventional Law of Europe, was furnished by the latest settlement of the Eastern Question. The Preamble of the Treaty of Constantinople, concluded between Great Britain and France on the one hand, and the Ottoman Porte on the other (March 12, 1854)[31], recites, "that her Majesty the Queen of Great Britain and Ireland, and his Majesty the Emperor of the French, have been requested by his Highness the Sultan to assist him in repelling the attack, which has been made by his Majesty the Emperor of all the Russias

[29] Annuaire Historique Universel, 1851. Appendix, p. 191.

[30] Annuaire. French Memorandum. App. p. 176. English note. App. p. 181.

[31] Martens, N. R. Gén. XV. p. 565.

on the Territory of the Sublime Porte, an attack whereby *the Integrity of the Ottoman Porte and the Independence of the Sultan's throne are endangered*, and as their Majesties are perfectly convinced that the existence of the Ottoman Empire in its present extent is of *essential importance to the Balance of Power amongst the States of Europe*; and as they have in consequence agreed to afford his Highness the Sultan the assistance which he has requested to this end, their aforesaid Majesties and his Highness the Sultan have deemed it proper to conclude a Treaty, so as to attest their intentions in conformity with the above."

In the Conferences subsequently held at Vienna in 1855 between France, Great Britain, Austria, the Ottoman Porte, and Russia, the principle of maintaining the European Equilibrium was repeatedly invoked by all Parties, as supplying a rule for approving or rejecting the various proposals of accommodation. This principle was more especially relied upon in reference to the Neutralisation of the Black Sea, and to the maintenance of the ancient Rule of the Ottoman Porte, according to which the Passage of the Straits leading from the Mediterranean into the Black Sea is closed against the vessels of war of all Nations, whilst the Ottoman Porte remains at peace with all Nations[32].

[32] Protocol to the 12th Conference, (21 April, 1155.) Martens, N. R. Gén. XV. p. 676.

CHAPTER VIII.

RIGHT OF ACQUISITION.

Establishment of a Nation in a Country—Juridical Notion of Possession—Possession as founding a Right of Property—Primitive and Derivative Acquisition—Settlement of a Nation—Right of Occupation—Right of Discovery—Notification of Discovery—Acts Confirmatory of Occupation—Discovery followed by Settlement constitutes a Perfect Title—Extent of Right of Discovery—Extent of Right of Occupation—Principles of Law advanced by the United States of America—Discovery of the Mouth of a River—Conflict with Acknowledged Law—Right of Settlement—Usucaption or Prescription—Territory of the Hudson's Bay Company—Right of contiguity—Arcifinious States—Discovery of the New World—Settlements in the New World—Possessory Right of Native Indians—Agriculture in relation to Pasture—The Indian Title—Derivative Acquisition—Title by Cession.

Establishment of a Nation in a Country.

§ 113. By virtue of its Independence and its Right of Self-Preservation, every Nation is entitled to perfect freedom of action with a view to promote its own welfare within a sphere, which is consistent with the Independence and Self-Preservation of other Nations. It may accordingly not merely make use of the gifts of nature for the satisfaction of its immediate wants, but, if they are susceptible of exclusive possession, it may appropriate them to meet its future wants. This Right of a Nation to possess a thing (*Jus Possidendi*) applies not merely to the fruits of the earth, but to the soil which produces it. Vattel regards the right of a Nation to possess a territory as incident to its Right of Self-Preservation. "The earth," he writes[1], "belongs to mankind in general, destined by the Creator to be their common habitation, and to supply them with food; they all possess a Natural

[1] Droit des Gens, L. I. § 203.

Right to inhabit it, and to derive from it whatever is necessary for their sustenance and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously and without culture sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labour, or being disappointed in the fruits of their industry, apply themselves to render those lands fertile, and thence derive their sustenance. Such must have been the origin of the Rights of Property and Domain, and it was a sufficient ground to justify their establishment. Since their introduction, the Right, which was common to all mankind, is individually restricted to what each lawfully possesses. The country which a Nation inhabits, whether that Nation has emigrated thither in a body, or the different families of which it consists were previously scattered over the country, and there uniting formed themselves into a political society, that country, I say, is the Settlement of the Nation, and it has a peculiar and exclusive right to it."

Juridical Notion of Possession.

§ 114. The Right of a Nation to possess a territory being admitted, it follows that we should consider what constitutes Lawful Possession; in other words, what constitutes Possession, not merely as the consequence of a Right, but as itself the Foundation of Rights. "All Definitions of Possession," writes Savigny[2], "however much they may differ from one

[2] Das Recht des Besitzes. Giessen, 1837, p. 2, 3. This work has been translated into English by Sir Erskine Perry. London, 1848.

another in terms, and even in substance, contain the same general principle as their basis, from which every inquiry into the subject must proceed. By the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it may be prevented. Thus the seaman possesses his ship, but not the water in which it moves, although he makes each of them subserve his purpose. The condition of a thing, which is termed *Detention*, and upon which all our notions of Possession are founded, is not by itself in any way an object of Legislation, and the Notion of it is not in itself a Juridical Notion, but it bears an immediate relation to a Juridical Notion, whereby it becomes itself an object of Legislation. For as Property consists in the legal power of dealing with a thing at will, and of excluding every one else from its enjoyment, the exercise of Property takes place by Detention, and Detention is accordingly the condition of Fact, which corresponds to Property as the condition of Law." The Right to possess (*Jus Possidendi*) thus forms part of the Theory of Property, and the act of Detention acquires a Juridical character in connection with the Right to possess.

Possession as founding a right of property.

§ 115. The lawfulness of all possession depends upon what the later Roman Jurists call the *modus acquirendi*. The Act of Detention *per se* in the case of a person detaining a thing constitutes a condition of Fact, which has been termed by Jurists *Natural Possession*. The condition of Fact involved in bare Detention (nuda rei prehensio) is regarded as terminable at any moment; but if a person detains a thing *animo sibi habendi*, and manifests his intention of exercising ownership for himself, such con-

tinuing Detention gives rise to a condition of Law, and it has consequently been termed *Legal Possession.* "Apiscimur possessionem animo et facto, neque per se animo aut per se corpore[3]." The condition of Law arises in this manner. There is an obligation of Natural Law upon all persons to refrain from Personal violence, for Personal inviolability is a Natural Right. But the continuing Detention of a thing, *animo sibi habendi*, cannot be interrupted or put an end to against the will of the party so detaining it, without violence to his person. There thus arises an obligation of Natural Law to refrain from disturbing a party who is in possession of a thing, as the Inviolability of the Person extends to those acts of disturbance, whereby the Person might at the same time be, however indirectly, interfered with. The Right of Property is thus a Corollary to the Right of Personal Inviolability, for *the Right of Property* in a thing, or the lawful power of dealing with it at will, may be said to have arisen, when all persons recognise the party in Possession of a thing to have a Right of excluding them from dealing with it, and that Right is *de facto* recognised, when all persons admit an obligation on themselves to refrain from disturbing him in his possession of it. Possession accordingly, that is, a continuing Detention *animo sibi habendi* as distinguished from bare Detention, gives rise to the right of not being disturbed; and when the Possession itself is rightful in its origin, the Right which ensues is a *perfect Right.* In respect of this Right, certain rules[4], as to the acquisition and

[3] Dig. L. XLI. Tit. II. § 3.

[4] These rules, and many others which refer to Dominion and its incidents, are borrowed from the Roman Jurisconsults, who held them to be institutions of the Jus Gentium, or common Law of all Nations.

loss of Possession, have been established. The first rule is, that a person may take possession of a thing which has no owner, so as to acquire Rightful Possession of it; and Property is in such case acquired simultaneously with Possession. "Quod enim nullius est, id ratione naturali occupanti conceditur[5]." The second rule is, that a person may acquire Rightful Possession of a thing of which the previous owner has renounced Possession, either relatively in his favour by Cession, or absolutely to the first comer by Abandonment.

Primitive and Derivative acquisition.

§ 116. Rightful Acquisition, as the foundation of the Right of Property in individuals, is accordingly either *primitive* or *derivative*[6]. Primitive Acquisition is termed *Occupation*. "On appelle *occupation* un fait, par lequel quelqu'un déclare qu'une chose, qui n'est à personne, doit être à lui, et la réduit en tel état qu'elle peut être sa chose. Il paroît de là que le droit d'occuper une chose, ou de s'en emparer, appartient naturellement à chacun indifféremment, ou bien que c'est un droit commun de tous les hommes, et comme on appelle manière primitive d'acquérir celle par laquelle on acquiert le domaine d'une chose qui n'est à personne, il s'ensuit que l'occupation est la manière primitive d'acquérir[7]."

Such being the Law of Nature in regard to primitive acquisition on the part of individuals, the Law of Nations is in perfect accord with it. "All mankind," writes Vattel, "have an equal right to things that have not yet fallen into the hands of any one; and those things belong to the person who first takes possession of them. When, therefore, a Nation finds a country uninhabited and without an owner, it may

[5] Dig. L. XLI. Tit. I. § 3.
[6] Grotius, L. II. c. 3. § 1.
[7] Wolff, Institutions du Droit de la Nature et des Gens, § 210.

lawfully take possession of it; and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another Nation. Thus navigators going on voyages of discovery, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their Nation, and this title has been usually respected, provided it was soon after followed by a real possession [8]."

Settlement of a Nation.

§ 117. Settlement accordingly in a country in the case of a Nation corresponds to the continuing Detention of a thing in the case of an individual, and the Natural Right of a Nation founded on Settlement corresponds to the Natural Right of an individual founded on Possession. There is thus an obligation of Natural Law upon all Nations to refrain from disturbing a Nation which has settled in a country, which was vacant at the time of its settlement. "Un état peut acquérir des choses qui n'appartiennent à personne (res nullius) par l'*occupation* (originaire), les biens d'autrui au moyen de *conventions* (occupation dérivative) . . . Pour que l'*occupation* soit légitime, la chose doit être susceptible d'une propriété exclusive, elle ne doit appartenir à personne; l'état doit avoir l'intention d'en acquérir la propriété et en prendre possession, c'est à dire, la mettre entièrement à sa disposition et dans son pouvoir physique. Ceci a lieu lorsqu'il a tellement influé sur la chose, qu'elle ne peut lui être enlevée sans lui ravir en même temps le fruit du changement légitime qu'il y a opéré [9]."

Right of occupation.

§ 118. The exclusive Right of a Nation to Territory which it has acquired by *Occupation*, has been universally recognised by the Nations of Europe, and in respect of such Right certain rules have become

[8] Droit des Gens, L. I. § 207.

[9] Klüber, Droit des Gens, Part II. c. 1. § 125.

established by usage, whereby the condition of Law constituting *Occupation* may be placed beyond doubt. The Natural Right of an individual to appropriate the object of his discovery rests upon the presumption that it has no owner, which presumption, in the case of the first comer, is a necessary presumption, and consequently a *præsumptio juris et de jure.* But the act of discovery alone does not constitute Occupation by the Law of Nations. The title which results from Discovery is only an inchoate title. It is not recognised in the Roman Law, nor has it a place in the system of Grotius or of Puffendorf. The principle, however, upon which it is based, is noticed by De Wolff.

"Pareillement si quelqu'un renferme un fond de terre dans des limites, ou le destine à quelque usage par un acte non passager, ou que se tenant sur ce fond limité, il dise en présence d'autres hommes qu'il veut que ce fond soit à lui, il s'en empare[10]." M. Luzac has appended to this passage the following note, "Nous ne trouvons pas cette occupation dans le droit Romain. C'est sur elle que sont fondés les droits, que les puissances s'attribuent, en vertu des découvertes."

Right of Discovery.

§ 119. A Nation is under an obligation towards other Nations analogous to that under which an individual stands towards other individuals with regard to the discovery of a thing, if it seeks to found an exclusive title to its possession upon *the Right of Discovery.* It must manifest in some way or other to other Nations its intention to appropriate the territory to its own purposes. The Comity of Nations then sanctions a presumption, that the execution of the intention will follow within a reasonable time the

[10] Wolff, Institutions du Droit de la Nature et des Gens, § 213.

announcement of it. But Natural Reason requires that the Discovery should be notified to other Nations, otherwise if actual Possession has not ensued, the obvious inference would be that the Discovery was a transient act, and that the territory was never taken possession of *animo et facto*. A Discovery accordingly, which has been concealed from other Nations, has never been recognised as a good title to bar them from settling in a territory: it is an inoperative act. Lord Stowell[11] has accordingly noticed, as an indisputable fact, that in newly discovered countries, where a title is meant to be established for the first time, some act of Possession is usually done and proclaimed as a *Notification of the fact*.

Notification of Discovery.

§ 120. The mode of Notification, in other words, what acts should be respected by the Comity of Nations, and be held sufficient to make known the intention of a Nation to avail itself of a discovery, has been a subject of much dispute. The disposition however of Writers, as well as of Statesmen, has been to limit rather than to extend the Comity of Nations in this respect. Thus Vattel writes, "The Law of Nations will therefore not acknowledge the Property and Sovereignty of a Nation over any uninhabited countries except those of which it has really taken possession, in which it has formed settlements, or of which it has actual use. In effect, when Navigators have met with desert countries in which those of other Nations had in their transient visits erected some monuments to show their having taken some possession of them, they have paid as little regard to that empty ceremony, as to the regulation of the Popes, who divided a great part of the world between the Crowns of Castile and Portugal[12]."

[11] The Fama, 5 Robinson, p. 115. [12] Droit des Gens, L. I. § 208.

To the same purport, Martens writes, "Supposé que l'occupation soit possible, il faut encore qu'elle ait eu lieu effectivement ; que le fait de la prise de possession ait concouru avec la volonté manifeste de s'en approprier l'objet. La simple déclaration de volonté d'une Nation ne suffit pas, non plus qu'une Donation Papale, ou qu'une Convention entre deux Nations pour imposer à d'autres le devoir de s'abstenir de l'usage ou de l'occupation de l'objet en question. Le simple fait d'avoir été le premier à découvrir ou à visiter une île, &c., abandonnée ensuite, semble insuffisant, même de l'aveu des Nations, tant qu'on n'a point laissé de traces permanentes de possession et de volonté ; et ce n'est pas sans raison qu'on a souvent disputé entre les Nations, si des croix, des poteaux, des inscriptions, &c., suffisent pour acquérir ou pour conserver la propriété exclusive d'un pays, qu'on ne cultive pas [13]."

Klüber to the same effect, writes thus, "Pour acquérir une chose par le moyen de *l'occupation*, il ne suffit point d'en avoir seulement l'intention, ou de s'attribuer une possession purement mentale ; la déclaration même de vouloir occuper, faite antérieurement à l'occupation effectuée par un autre, ne suffirait pas. Il faut qu'on ait réellement occupé le premier, et c'est par cela seul, qu'en acquérant un droit exclusif sur la chose, on impose à tout tiers l'obligation de s'en abstenir. L'occupation d'une partie inhabitée et sans maître du Globe de la Terre, ne peut donc s'étendre plus loin qu'on ne peut tenir pour constant qu'il y ait eu effectivement prise de possession, dans l'intention de s'attribuer la propriété. Comme preuves d'une pareille prise de possession, ainsi que de la continuation de la possession en propriété, peuvent servir

[13] Précis du Droit des Gens, § 37.

tous les signes extérieurs qui marquent l'occupation et la possession continue[14]." To this passage there is appended the following note. "Le droit de propriété d'état peut, après le droit des Gens, continuer à exister, sans que l'état continue la possession corporelle. Il suffit qu'il existe un signe, qui dit que la chose n'est ni *res nullius*, ni délaissée. En pareil cas, personne ne saurait s'approprier la chose, sans ravir de fait à celui, qui l'a possédée jusqu'alors en propriété, ce qu'il y a opéré de son influence d'une manière légitime: enlever ceci, ce serait blesser le droit du propriétaire."

Acts confirmatory of Occupation.

§ 121. It is difficult to lay down absolutely what constitutes a sufficient sign, that a territory has been effectively reduced into Possession after Discovery. Bynkershoek, who was originally opposed to the continuance of any exclusive Right founded on Occupation, unless natural Possession was maintained, subsequently qualified his view in deference to the objections of Christian Thomasius: "Res immobiles," writes Thomasius[15], "quæ sunt nullius, occupatæ esse censentur, si cœptæ sunt custodiri, aut si cœperim solo uti ad id, ad quod destinatum est naturâ, et usus durat; V. G. Si ædificaverim in solo, si solum vallo et fossa vel sæpibus circumdederim, conservatur possessio, quamdiu continuatur custodia, etiamsi non incumbam possessioni, sed abeam. V. G. Si ager consitus sit, et fructus a me satos ferat, si ager circumseptus sit, si ædes extructæ maneant, si clavem ad ædes habeam, si alios arceam ab usu rei." "Hæc ille," writes Bynkershoek, "et recte, nam omnibus his, quos recenset, modis possessio ex apprehensione cœpta, porro continuatur, et continuata possessione continuatur dominium. Cultura

[14] Droit des Gens, § 126.

[15] Annotationes ad Ulricum Huberum de Jure Civitatis, L. II. s. 11. § 43.

itaque et cura agri possessionem quam maxime indicat. Neque enim desidero vel desideravi unquam, ut tunc demum videatur quis possidere, si res mobiles ad instar testudinum dorso ferat suo, vel rebus immobilibus incubet corpore, ut gallinæ solent incubare ovis. *Præter animum possessionem desidero*, sed *qualemcunque, quæ probet me nec corpore desiisse possidere*[16]."

Discovery followed by Settlement constitutes a perfect title.

§ 122. When *Discovery* has been followed by the *Settlement* of a Nation, other Nations in accordance with the Law of Nature recognise a perfect title in the occupant. Where discovery has not been immediately followed by settlement, but the fact of discovery has been notified, other Nations by courtesy pay respect to the notification, and the Usage of Nations has been to presume that Settlement will take place within a reasonable time; but unless discovery has been followed within a reasonable time by some sort of settlement, the presumption arising out of notification is rebutted by *non user*, and lapse of time gives rise to the opposite presumption of Abandonment. Thus in the Conference[17] held at London between the Commissioners of Great Britain and of the United States of North America in 1826, the British Commissioners, Messrs. Huskisson and Addington, maintained these views: "Upon the question how far prior discovery constitutes a legal claim of Sovereignty, the Law of Nations is somewhat vague and undefined. It is however admitted by the most approved writers, that mere accidental discovery, unattended by exploration, by formally taking possession in the name of the discoverer's Sovereign, by occupation and settlement more or less permanent,

[16] De Dom. Maris, c. 1. [17] British Statements annexed to the Protocol of the Sixth Conference.

by purchase of the territory on receiving the Sovereignty from the Nation, constitutes the lowest degree of title; and that it is only in proportion as first discovery is followed by any or all of these acts, that such title is strengthened and confirmed." Mr. Gallatin; on the other hand, the Plenipotentiary of the United States [18], thus states the American view, "It may be admitted, as an abstract principle, that, in the origin of Society, first occupancy and cultivation were the foundation of the rights of private property and of National Sovereignty. But that principle, on which principally, if not exclusively, it would seem that the British Government wishes to rely, could be permitted, in either case, to operate alone and without restriction, so long only as the extent of vacant territory was such, in proportion to the population, that there was ample room for every individual and for every distinct community or Nation, without danger of collision with others. As in every Society, it had soon become necessary to make laws, regulating the manner in which its members should be permitted to occupy and to acquire vacant land within its acknowledged boundaries; so also Nations found it indispensable for the preservation of peace, and for the exercise of distinct jurisdiction, to adopt, particularly after the discovery of America, some general rules, which should determine the important previous question, 'Who had a right to occupy.'

"The two rules generally, perhaps universally, recognised and consecrated by the Usage of Nations, have followed from the nature of the subject.

"By virtue of the first, prior discovery gave a right

[18] American Counterstatement annexed to the Protocol of the Seventh Conference.

to occupy, provided that occupancy took place within a reasonable time, and was ultimately followed by permanent settlement and by the cultivation of the soil."

"In conformity with the second, the right derived from prior discovery and settlement, was not confined to the spot discovered or first settled. The extent of territory which would attach to such first discovery or settlement, might not in every case be precisely determined. But that the first discovery and subsequent settlement within a reasonable time of *the mouth of a river*, particularly if none of its branches had been explored prior to such discovery, gave the right of occupancy and ultimately of Sovereignty to the whole country drained by such river and its several branches, has been generally admitted. And in a question between the United States and Great Britain, her acts have with propriety been appealed to, as showing that the principles on which they rely accord with their own [19]."

Extent of Right of Discovery.

§ 123. The question as to the extent of territory over which the discovery of a part gives rise to the right of occupancy, may receive a solution by reference to the principles of Law, which decide to what extent natural possession must go in order to give a title to more than is actually inhabited. It is not necessary in order to constitute the occupant of a thing the legal proprietor of it, that he should have natural possession of the whole of it; if he has possession of a part, which cannot be separated from the whole, he is in possession of the whole. The Roman Jurists applied this principle to the possession of land, "Quod autem diximus *et corpore et animo acquirere nos debere possessionem*, non utique ita

[19] Message of President Adams to Congress, Dec. 28, 1827.

accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere[20]." In the case of a Legal Entity, as for instance the *property* of a farm or garden, the Law enables us to ascertain its boundaries by reference to records, and there is no practical difficulty in determining the extent of land over which the *possession* of a part carries with it the Right of Possession, (Jus Possessionis.) But in the case of an unoccupied country, the *natural possession* of a part cannot carry with it the *legal possession* of the whole; as if it were so, there would be no territory legally vacant on the mainland, seeing that the first settlers in any part of a great Continent would by virtue of occupying that part be in rightful possession of the whole.

Extent of Right of Occupation.

§ 124. "If at the same time," writes Vattel[21], "two or more Nations discover and take possession of an island or any other desert land without an owner, they ought to agree between themselves and make an equitable partition; but if they cannot agree, each will have the Right of Empire and the Domain in the parts in which they have first settled." So far Vattel seems to restrict the Right of Possession to the country actually taken possession of; but in another passage he indirectly points to something more. "It may happen[22], that a Nation is contented with possessing only certain places, or appropriating to itself certain rights in a country which has not an owner, without being solicitous to take possession of the whole country. In this case, another Nation may take possession of what the first has neglected: but

[20] Dig. XLI. Tit. II. § 3. [21] Droit des Gens, L. II. § 9.
[22] Ibid. § 98.

this cannot be done without allowing all the rights acquired by the first to subsist in their full and absolute Independence." Hence if a Nation has occupied a territory, it has a right to every thing, as appurtenant to the territory, which is necessary for the integrity and security of its possession. Upon an analogous principle, when a Nation has discovered a country, and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the Independence and Security of its Settlement, and its Right of Discovery is coextensive with such limits.

Principles of Law advanced by the United States of America.

§ 125. The principles applicable to such questions were discussed by the Commissioners of the United States of America, in the negociations with the Commissioners of Spain, on the subject of the Western boundary of Louisiana. "The principles," they observe, "which are applicable to the case, are such as are dictated by reason, and have been adopted in practice by European Nations in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and at the same time founded in strict justice. The first of these is that, when any European Nation *takes possession of any extent of sea-coast, that possession is understood as extending into the interior Country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover*, and to give it a right in exclusion of all other Nations to the same[23]. It is evident that some rule or principle must govern the rights of European Powers in regard to each other, in all such cases, and it is certain that none can be adopted, in those

[23] Mémoire de l'Amérique, p. 116.

cases to which it applies, more reasonable or more just than the present one. Many weighty considerations show the propriety of it. Nature seems to have destined a larger range of territory so described for the same Society; to have connected its several parts together by a common interest, and to have detached them from others. If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition: but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of an European Power, who discovered and took possession of a new country, to the spot on which its troops or settlements rested: a doctrine which has been totally disclaimed by all the Powers who made discoveries and acquired possession in America. The other extreme would be equally improper; that is, that the Nation, who made such discovery should, in all cases, be entitled to the whole territory so discovered. In the case of an Island, whose extent was seen, which might be soon sailed round and preserved by a few forts, it may apply with justice; but in that of a Continent it would be absolutely absurd. Accordingly we find that this opposite extreme has been equally disclaimed and disavowed by the doctrine and practice of European Nations. The Great Continent of America, North and South, was never claimed or held by any one European Nation, nor was either great section of it. Their pretensions have always been bounded by more moderate and rational principles. The one laid down has obtained general assent[24]."

Possession of the coast

The Commissioners of the United States on this

[24] British and Foreign State Papers, 1817–18, p. 327.

occasion, in applying the above principle to the claim of their Nation, were careful not to press the doctrine of virtual possession beyond those limits within which the Nations of Europe would be in accord with them. On the authority of the principle above stated, they say, "it is evident that by the discovery and possession of the River Mississippi in its whole length, and *the Coast adjoining it*, the United States are entitled to the whole country dependent on that River, the waters which empty into it, and their several branches *within the limits on that coast.*" In other words, they maintain that the occupation of the sea-coast entitles a Nation to the possession of the inland territory, and of the navigable rivers included within it; in which position of Law all European Nations agree. But such a position of Law differs materially from that, which was contended for by Mr. Gallatin on behalf of the United States in the Conferences in London in 1827, already alluded to, (§ 122).

includes the inland territory.

§ 126. The position of Law maintained on behalf of the United States by Mr. Gallatin in 1827, above alluded to, (§ 122,) had been previously advanced by Mr. Rush in 1824, when resident as Minister Plenipotentiary of the United States in London. "I asserted," he writes to the American Secretary of State, Hon. J. Quincy Adams, "that a Nation discovering a country *by entering the mouth of its principal river* at the sea-coast, must necessarily be allowed to claim and hold as great an extent of the Interior country as was described by the course of such principal river and its tributary streams[25]."

Discovery of the mouth of a River.

The Plenipotentiaries of the United States in support of their position, appealed to the language of

[25] British and Foreign State Papers, 1825–26, p. 506.

ancient Charters accorded to Companies of Adventurers and to individual explorers by various European Sovereigns, as evidence of the practice of European Nations in regard to the rights resulting from discovery. It was replied on behalf of the British Plenipotentiaries, that those Charters had no valid force or effect against the subjects of other Sovereigns, but could only bind and restrain *vigore suo* those who were under the Jurisdiction of the Grantor of the Charters, and that although they might confer on the Grantees an exclusive title against the subjects of the same Sovereign Power, they could only affect the subjects of other Sovereign Powers, so far as the latter might be bound by the Common Law of Nations to respect acts of Discovery and Occupation, effected by the members of other Independent Political Communities. The reply of the British Commissioners was in perfect harmony with the principle under which Great Britain, France, and Holland refused to recognise the authority of the Papal Donation; by virtue whereof Spain and Portugal claimed to exclude all other European Nations from the possession and use of the lands and seas which had been granted to them in the famous Bull of Pope Alexander VI (anno 1493). Accordingly when Mendoza the Spanish Ambassador remonstrated against the expedition of Drake, Queen Elizabeth replied, that "she did not understand why either her subjects or those of any other European Power should be debarred from traffick in the Indies: that she did not acknowledge the Spaniards to have any title by donation of the Bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for their having touched only here and there upon a Coast, and given names

to a few rivers and capes, were such insignificant things as could in no way entitle them to property (proprietas) further than in the parts where they actually settled and continued to inhabit[26]."

§ 127. The principle involved in the position of Law, advanced by the United States on the above occasions, seems not to be reconcilable with other positions of Law, in which all Nations agree. It is inconsistent, in the first place, with one of the positions of Law upon which the United States themselves rested their claims against Spain respecting the boundary of Louisiana in 1805, (§ 125,) namely, that the discovery and occupation of *an extent of sea-coast* by a Nation are understood to convey to that Nation a right of possession over the interior country *as far as the watershed-line*, which position of Law Messrs. Monroe and Pinckney, the Commissioners of the United States, then alleged to have been completely established by the Controversy between France and Spain on the one hand, and Great Britain on the other, which produced the War of 1755 between those Nations. Conflict with acknowledged Law.

It is obvious that a claim to all the lands watered by a river and its tributaries, founded on the discovery and occupation of the mouth of the river, must conflict with a claim to all the inland territory as far as the line of watershed, founded on the discovery and occupation of an extent of sea-coast, about which latter position of Law there is no dispute amongst Nations. Such a claim is, in the second place, inconsistent with the position of Law, that the occupation *de facto* of one bank of a river and the river itself by one Nation, does not establish a Right of Possession over the opposite bank, so as to exclude another Na-

[26] Camdeni Annales, anno 1580.

tion from settling upon it, if it should be vacant *de facto*. The doctrine of the United States Commissioners against which Great Britain considered it equally due to herself and to other Powers to enter her protest, may therefore be regarded as extravagant, since it derives no countenance from the Law of Nature, which regards rivers as appurtenant to land, and not land as adherent to rivers, and it cannot be admitted without derogating from established rules of Public Law acknowledged by all Nations.

Right of Settlement.

§ 128. *Settlement*, when it has supervened on *Discovery*, constitutes a perfect title, but a title by settlement when not combined with a title by discovery is in itself imperfect, and its *immediate* validity will depend upon one or other condition, that the right of discovery has been waived *de jure* by non-user, or that the right of occupancy has been renounced *de facto* by the abandonment of the territory. *Acquisition by settlement* is distinguished from *acquisition by discovery* and *acquisition by occupancy* in this respect, that no second discovery, no second occupancy can take place, whereas a series of settlements may have been successively made, and each of them in its turn abandoned, and the last settlement may, under given circumstances, constitute an exclusive title. Again, the presumption of Law will always be in favour of a title by settlement. "Commodum possidentis in eo est, quod etiamsi ejus res non sit, qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio; propter quam causam, cum obscura sint utriusque jura, contra petitorem judicari solet[27]."

Where *title by settlement* is superadded to *title by discovery*, the Law of Nations will acknowledge the

[27] Justin. Institut. L. IV. Tit. 15. § 4.

settlers to have a perfect title; but where title by settlement is opposed to title by discovery, although no Convention can be appealed to in proof of the discovery having been waived, still, a tacit acquiescence on the part of the Nation, that asserts the discovery, during a reasonable lapse of time since the settlement has taken place, will bar its claim to disturb the settlement. Thus Mr. Wheaton writes:—"The constant and approved practice of Nations shows, that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other, in the same manner as by the Law of Nations, and by the Municipal Code of every Civilised Nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and upon the inference, fairly to be drawn from his silence and neglect, of the original defect of his title, or of his intention to relinquish it[28]."

Title by settlement, though originally imperfect, may be thus perfected by enjoyment during a reasonable lapse of time, the presumption of Law from undisturbed possession being, that there is no prior owner, because there is no claimant, and no better proprietary right, because there is no asserted right. The silence of other parties raises a presumption of their acquiescence, and their acquiescence raises a presumption of a defect of title on their part, or of an abandonment of their title. A title once abandoned, whether tacitly or expressly, cannot be resumed. "Celui qui abandonne une chose cesse d'en être le

[28] Elements of International Law, part II. c. iv. § 5.

maître, et par conséquent une chose abandonnée devient une chose qui n'est à personne[29]."

Usucaption or Prescription.

§ 129. Title by settlement, then, as distinguished from title by discovery, when set up as a perfect title, resolves itself into title by *usucaption* or *prescription*. Wolff defines *usucaption* to be an acquisition of domain founded on a presumed desertion. Vattel[30] says it is the acquisition of domain founded on a long possession, uninterrupted and undisturbed, that is to say, an acquisition solely proved by this possession. *Prescription*, on the other hand, according to the same author, is the exclusion of all pretensions to a right, an exclusion founded on the length of time during which that right has been neglected, or, according to De Wolff's definition, it is the loss of an inherent right by virtue of a presumed consent. Vattel writing in French, and observing that the word *usucaption* was but little used in that language, made use of the word *prescription*, wherever there were no particular reasons for employing the other expression. The same remark may be applied in reference to our own language, and thus this title is generally spoken of as *title by prescription*. What lapse of time is requisite to found a valid title by prescription has not been definitely settled. The Law of Nature suggests no rule. Where, however, the claimant cannot allege undoubted ignorance on his part or on the part of those from whom he derives his right, or cannot justify his silence by lawful and substantial reasons, or has neglected his right for such a number of years as to allow the respective rights of the two parties to become doubtful, the presumption of abandonment

[29] Wolff, Institutions du Droit de la Nature et des Gens, § 23.
[30] Droit des Gens, L. II. c. 11. § 140.

will be established against him, and he will be excluded by ordinary prescription. Lapse of time, in the case equally of Nations as of individuals, robs the parties of the means of proof; so that if a *bonâ fide* possession were allowed to be questioned by those who have acquiesced for a long time in the enjoyment of a thing by the possessor of it, length of possession, instead of strengthening, would impair the title of the possessor: the inconvenience of such a result is so obvious, that the practice of Nations and individuals has equally repudiated it.

Territory of the Hudson's Bay Company.

§ 130. Thus in regard to the territory of the Hudson's Bay Company, it was alleged in the negociations preliminary to the Treaty of Utrecht, that the French had acquiesced in the settlement of the Bay of Hudson by the Company incorporated by Charles II. in 1663, since M. Fontenac, the Governor of Canada, in his correspondence with Mr. Baily, who was Governor of the Factories in 1637, never complained, "for several years, of any pretended injury done to the French by the said Company's settling a trade, and building of forts at the bottom of the Bay[31]." The King of England, it is true, in his Charter had set forth the Title of the British Crown, as founded on discovery; the title by discovery, however, required to be perfected by settlement; and thus, in the negociations, the subsidiary title by settlement was likewise set up by the British Commissioners, and the acquiescence of the French was alleged, either as a bar to their setting up any conflicting title by discovery, or as establishing the presumption of their having abandoned their asserted rights of discovery[32].

[31] General Collection of Treaties, &c., London, 1710–33, vol. I. p. 446.

[32] Twiss on The Oregon Question, p. 171.

Right of Contiguity.

§ 131. What extent of territory is *de jure* appendant to the settlement of a Nation in a given place by reason of *Contiguity*, must depend upon the circumstances of each case. It may sometimes be determined without difficulty by the geographical features of the Country, but in many cases it will be governed by considerations founded on the necessary uses of the settlers. The principle of *Vicinitas*, as applied in the Jurisprudence of Imperial Rome, has been admitted by the usage of Nations to control this question in the absence of special circumstances. Thus in the case of alluvial deposits, the Roman Jurists held that the possessor of the adjoining bank of a river had a proprietary title to them, and if an island were formed in the channel of the river, the possessor of the neighbouring bank had a right of property in it; on the other hand, if an island were formed in the mid-channel, it would be the common property of the owners of the two banks. Thus, "Quod per alluvionem agro nostro flumen adjecit, jure gentium nobis acquiritur[33];" again, "Insula nata in flumine, quod frequenter accidit, si quidem mediam partem fluminis tenet, communis est eorum, qui ab utraque parte fluminis prope ripam prædia possident, pro modo latitudinis cujusque fundi, quæ latitudo prope ripam sit; quod si alteri parti proximior est, eorum est tantum, qui ab ea parte prope ripam prædia possident[34]." A different practice in the case of Nations, whereby such newly formed lands should be open to the occupancy of the first comer, would manifestly be inconsistent with the security of the Nation, which had previously established itself on the adjoining or neighbouring bank. Upon the like considerations of security, islands which have been formed by the accumulation of mud

[33] Dig., l. XL. t. 1. § 7. [34] Inst. II. tit. 1. § 22.

and drift at the mouth of a river, and which keep sentinel as it were over the approaches to the mainland, are regarded as natural or necessary appendages of the Coast on which they border, and from which they are formed. "Consider," says Lord Stowell in the case of certain islands at the entrance of the River Mississippi, "what the consequences would be, if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power may occupy them, they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least, that they might be so occupied by European Nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show, that these islands are not to be considered as part of the Territory of America[35]."

Arcifinious States.

§ 132. A title to Territory by reason of contiguity, (ratione vicinitatis,) in the case of *arcifinious* States, so called according to Varro[36] because their territory admits of boundaries fit to keep the enemy out, (fines arcendis hostibus idoneos,) in other words, of States whose territory admits of practical limits, such as rivers and mountains, is *a reciprocal title.* In such cases each State has an equality of right, so that the watershed-line or line of greatest elevation in the case

[35] The Anna, 3 Ch. Robinson's Rep. p. 385.

[36] Grotius adopts the derivation of Varro. His Commentator Barbeyrac approves the etymology given by Gronovius, namely, because such lands had no boundaries (fines) fixed and determined by any artificial measure. De Jure Belli et Pacis, L. II. c. 3. § 16.

of mountains, and the Thalweg or mid-channel, in the case of rivers, which corresponds to a line drawn along the lowest part of the bed of the river or the line of deepest depression, forms the juridical boundary between two such States. The practice of Nations has conformed to this principle in regard to territory which is not arcifinious, in cases where there is intermediate vacant land contiguous to the settlements of two nations. Each Nation has an equal title to extend its settlement over the intermediate vacant land, and thus it happens that the middle distance satisfies the juridical title, whilst it is the nearest approximation to a natural boundary, and the most convenient to determine. Thus the United States of America in their discussions with Spain respecting the Western boundary of Louisiana, contended that "whenever one European Nation makes a discovery, and takes possession of any portion of that Continent, (America,) and another afterwards does the same at some distance from it, when the boundary between them is not determined by the principle above mentioned, (namely, that when a Nation takes possession of an extent of sea-coast, it has a right of possession over the interior country coextensive with the waters of the rivers emptying within that coast,) the middle distance becomes such of course [37]."

So, in the case of a river, the opposite banks of which are possessed by different Nations, the Thalweg or mid-channel is the Normal water-boundary between them. Circumstances however may create exceptions, as, for instance, when the control of a district not actually reduced into the possession of a Nation, is necessary for its security, and is not essential to the security of the conterminous State. "No Nation,"

[37] British and Foreign State Papers, 1817–18, p. 328.

writes Vattel, "can lawfully appropriate to herself a too disproportionate extent of country, and reduce other Nations to want subsistence and a place of abode. A German Chief in the time of Nero said to the Romans, 'As Heaven belongs to the Gods, so the Earth is given to the human race, and desert countries are common to all[38],' giving those proud conquerors to understand that they had no right to reserve and appropriate to themselves a country which they left desert. The Romans had laid waste a chain of country along the Rhine, to cover their provinces from the incursions of the Barbarians. The remonstrance of the German Chief would have had a good foundation, had the Romans pretended to keep without reason a vast country which was of no use to them; but those lands which they would not suffer to be inhabited, serving as a rampart against foreign Nations, were of considerable use to the Empire[39]."

Discovery of the New World.

§ 133. "There is another celebrated question," writes Vattel, "to which the discovery of the New World has given rise. It is asked whether a Nation may lawfully take possession of some part of a vast country in which there are none but erratic Nations, whose scanty population is incapable of occupying the whole. We have already observed in establishing the obligation to cultivate the Earth, that those Nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession, and the people of Europe too closely pent up at home, finding land of which the savages stood in no particular need, and of which they

[38] Sicut cælum Diis, ita terras generi mortalium datas; quæque vacuæ, eas publicas esse.

[39] Droit des Gens, L. II. § 86.

made no actual or constant use, were lawfully entitled to take possession of it, and settle it with colonies. The Earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence. If each Nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our Globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not therefore deviate from the views of Nature in confining the Indians within narrow limits[40]." Vattel has elsewhere observed, "Those who still pursue this idle mode of life, (namely, who to avoid labour choose to live by hunting and by their flocks,) usurp more extensive territory than with a reasonable share of labour they would have occasion for, and have therefore no reason to complain if other Nations, more industrious and more closely confined, come and take possession of part of those lands. Thus, though the conquest of the civilised empires of Peru and Mexico was a notorious usurpation, the establishment of many Colonies on the Continent of North America, might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them[41]."

Settlements in the New World.

§ 134. "On the discovery of this immense Continent," to quote the words of Chief Justice Marshall[42], "the great Nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for

[40] Droit des Gens, L. I. § 209.
[41] Ibid. § 81.
[42] Johnson v. McIntosh. 8 Wheaton, p. 573.

considering them as a people over whom the superior Genius of Europe might claim an ascendency. The Potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New World, by bestowing on them Civilisation and Christianity in exchange for Independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the Right of Acquisition, which they all asserted, should be regulated as between themselves. This principle was, that Discovery gave title to the Government, by whose subjects or by whose authority it was made, against all other European Governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the Nation, making the discovery, the sole right of acquiring the soil from the Natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented. Those relations, which were to exist between the Discoverer and the Natives, were to be regulated by themselves. The Right thus acquired being exclusive, no other Power could interfere between them."

"In the establishment of these relations, the Rights of the original Inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their Rights to

complete Sovereignty, as Independent Nations, were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the Right of the Natives, as occupants, they asserted the ultimate dominion to be in themselves; and obtained and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the Natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian Right of Occupancy."

Possessory Right of Native Indians.

§ 135. The United States have consequently adhered to the customary rule amongst European Nations with regard to Territorial Title. "The title of the European Nations," says Chancellor Kent[43], "and which passed to the United States, to this immense Territorial Empire was founded on Discovery and Conquest; and by the European customary Law of Nations, prior discovery gave this title to the soil, subject to the Possessory Right of the Natives, and which occupancy was all the Right which European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands; but to be incapable of transferring the absolute title to any other than the Sovereign of the country, who has an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest."

§ 136. The question whether agriculturists and

[43] Commentaries on American Law, B. I. p. 258.

manufacturers have a right on abstract principles to expel shepherds from their pasture-grounds, or hunters from the territory over which they range in pursuit of game, or to contract the limits within which they shall exercise their avocations, has thus been discussed by Vattel [44]: "Families which wander in a country, as pastoral people, and which range through it as their wants require, possess it in common. It belongs to them, to the exclusion of all other Nations, and we cannot without injustice deprive them of the tracts of country of which they make use. But let us here recollect what we have said more than once [45]. The Savages of America had no right to appropriate all that vast Continent to themselves, and since they were unable to inhabit the whole of those regions, other Nations might, without injustice, settle in some parts of them, provided they left the Natives a sufficiency of land. If the pastoral Arabs would carefully cultivate the soil, a less space might be sufficient for them. Nevertheless no other Nation has a right to narrow their boundaries, unless it be under an absolute want of land. For in fact they *possess* their country; they make use of it after this manner; they reap from it an advantage suitable to their mode of life, respecting which they have no laws to receive from any one. In a case of pressing necessity, I think, people might without injustice settle in a part of that country, on teaching the Arabs the means of rendering it, by the cultivation of the Earth, sufficient for their own wants and those of the new inhabitants."

Agriculture in relation to pasture.

§ 137. This question has been treated with great lucidity and moderation in a judgment of Chief Jus-

The Indian Title.

[44] L. II. § 97. [45] L. I. § 81. and § 209. L. II. § 86.

tice Marshall[46]; "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian Title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

"The Title by Conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious Nation, and become subjects or citizens of the government with which they are connected. The new and old members of the Society mingle with each other; the distinction between them is gradually lost, and they make one People. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

"When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

[46] Johnson and Graham's lessee against McIntosh. 8 Wheaton, p. 589.

"But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and high-spirited as they were fierce, and were ready to repel by arms every attempt on their Independence.

"What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword; and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct Society; or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

"Frequent and bloody wars in which the Whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the Sovereign Power, and taken possession of by persons who claimed immediately from the Crown, or mediately, through its grantees or deputies.

"That Law which regulates, and ought to regulate

in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the Law of the Land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to Natural Right, and to the usages of Civilised Nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by Reason, and certainly cannot be rejected by Courts of Justice."

Derivative Acquisition.

§ 138. *Derivative Acquisition* as distinguished from *Original Acquisition* results from Indirect or Direct Cession. Indirect Cession takes place, when a Nation vanquished in war abandons a territory, and the Nation which has overrun it remains in possession of it. *Direct Cession*, on the other hand, is announced by some Act of a declaratory nature, whereby a Nation explicitly devolves its territorial rights to another Nation. The object of Direct Cession is sometimes

to prevent a war, but most frequently to cement a peace. The repeated occurrence of such Direct Cessions in later times has led Jurists to make a distinction accordingly between Acts which place on record such Cessions, and Treaties properly so called. "The compacts," writes Vattel[47], "which have temporary matters for their object are called agreements, conventions, and pactions. They are accomplished by one single Act and not by repeated Acts. The compacts are perfected in their execution once for all; treaties receive a successive execution, whose duration equals that of the treaty." Martens[48] to the same purport writes, "On divise ensuite en général les traités en *conventions transitoires*, qui s'accomplissent d'un seul coup, et en *traités proprement dits*, qui obligent à des prestations successives, quoique dans la pratique on ne suive pas toujours cette distinction dans le choix des termes, dont on désigne les arrangemens faits entre les nations. Les traités de cession, de limites, d'échange, et ceux même qui constituent une servitude de droit public, ont la nature des conventions transitoires; les traités d'amitié, de commerce, de navigation, les alliances égales et inégales, ont celle des traités proprement dits (fœdera). Les conventions transitoires sont perpétuelles par la nature des choses, de sorte qu'une fois accomplies, elles subsistent indépendamment des changemens survenus dans la personne du monarque, dans la forme du gouvernement, et même dans la Souveraineté de l'état contractant, tant qu'elles n'ont pas été mutuellement revoquées; une guerre même, survenue pour un autre motif, ne les fait pas tomber *d'elles mêmes*, quoiqu'elle autorise à en suspendre l'effet et quelquefois à les revoquer." To the

[47] L. II. § 163.
[48] Précis de Droit des Gens, § 58.

same effect, Mr. Wheaton[49] says, "General Compacts between Nations may be divided into what are called *transitory conventions* and *treaties* properly so called. The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the Sovereignty and form of Government of the Contracting Parties, and although their operation may in some cases be suspended during war, they revive on the return of peace without any express stipulation. Such are *treaties of cession, boundary, or exchange of territory*, or those which create a permanent servitude in favour of one Nation within the territory of another."

Title by Cession.

§ 139. In the case of Indirect Cession, which takes place by abandonment to an invading enemy, a confirmation of it is for the most part supplied by a subsequent treaty of peace concluded on the basis of "*uti possidetis*," whereby it is agreed that either Nation shall remain in possession of the territory which it has acquired during the war. But such Indirect Cession, although it remains incomplete during the war, seeing that there may be a change at any moment in the fortune of arms, does not require any such explicit confirmation in order to make it complete. If peace be concluded, without any stipulation for the restoration of territory on either side, the Nation, which has wrested during the war a town or a province from another Nation, acquires a lawful title to it by the conclusion of a treaty of peace with that Nation. The conclusion of the treaty of peace without reference to any restitutions is a tacit consent on the part of the Nation, from which a town or province has been wrested, that it should permanently remain in the hands of the conqueror; seeing that

[49] Elements of International Law, Part II. c. 4. § 9.

the worsted nation undertakes by concluding peace not to have recourse to force of arms for the recovery of its former possessions. "The effect of a treaty of peace," writes Vattel[50], "is to put an end to the war, and to abolish the subject of it. It leaves the Contracting Parties no right to commit any acts of hostility, on account either of the subject itself which had given rise to the war, or of anything that was done during its continuance; wherefore they cannot lawfully take up arms again for the same purpose." Title by Conquest thus resolves itself *juridically* into Title by Cession, and it is not the superior power of the conqueror which gives right to his conquest, but it is the consent of the conquered, which ultimately sanctions the conqueror's right of possession.

[50] Lib. IV. c. 2. § 19. Grotius de Jure B. et P. L. III. c. 9. § 4. and c. 20. § 10.

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CHAPTER IX.

RIGHTS OF POSSESSION.

The Territory of a Nation—Extension of Territory—Empire a primary Territorial Right—Empire distinct from Domain—Empire over things which cannot be appropriated—Empire over Territorial Rivers—Modification of Right of Empire by Compact—Empire over Frontier Rivers—Treaty Stipulations as to use of Frontier Rivers—Conventional Law of Europe as to Great Arterial Rivers—Treaties of Vienna, of Paris, and of Berlin—Treaty of London of 1883—The Thalweg or Midchannel the boundary of Conterminous States—Right of Alluvion—Prescriptive Rights over Rivers—The Stade or Brunshausen Toll.

The territory of a Nation.

§ 140. HAVING considered in the previous chapter the conditions under which a Nation may rightfully acquire possession of a country, we may proceed to consider the rights which a Nation may exercise by virtue of such possession; in other words, the *jura possessionis*, as distinguished from the *jus possidendi*. "When a Nation," writes Vattel[1], "takes possession of a country, it is considered as acquiring the empire or sovereignty over it at the same time with the domain[2]. For since the Nation is Free and Independent, it cannot be its intention in settling in a country to leave to others the right to command, or any of those rights which constitute Sovereignty. The whole space over which a Nation extends its government becomes the seat of its jurisdiction, and is called *its territory*." To the same effect De Wolff writes, "Si gens quædam regionem vacuam occupat, imperium in ea simul occupat[3]."

[1] Droit des Gens, L. I. § 205.

[2] In his autem, quæ proprie nullius sunt, duo sunt occupabilia, imperium et dominium quatenus ab imperio distinguitur. Grotius de Jure B. et P. L. II. c. 3. § 4.

[3] Jus Gentium, § 85.

§ 141. It is immaterial for the purposes of Empire as between Nations, whether a Nation acquires possession of a country by extending its political body coordinately, or by founding subordinate Political Bodies in the nature of Dependencies. Thus the Union of the North American States has extended itself over the North American Continent, by the admission of Coordinate States into the Union, on a footing of equality with the older and Sister States; whereas the monarchical States of Europe have extended themselves by Colonisation or by founding new States in Dependence upon themselves as Parent States. The political peculiarities, which distinguish these different forms of National growth, as practised by the Nations of the New World and the Old World respectively, are notable; but they are matters which concern the Internal organization of States, and have no necessary bearing upon their International relations. The founding of a new State in a condition of Political Dependence upon the Mother Country, constitutes as much an extension of a Nation's territory in regard to other Nations, as the incorporation of a new State into a National system of Coordinate States. In both cases the Nation consists of the aggregate body of States, and in the language of arithmeticians, the International Unit may be said to be a multiple political number, of which the component States are in the one case all whole numbers, and in the other case are one or more whole numbers and several fractions of a whole number. Extension of Territory.

Accordingly, when a Nation takes possession of a distant country and settles a colony there, that Country, though separated from the principal establishment or Mother Country, naturally becomes a part of the State equally with its ancient possessions.

Whenever, therefore, the Political Laws or Treaties make no distinction between them, anything said of a Nation must also apply to its Colonies[4].

Empire a primary territorial right.

§ 142. The exercise of Empire as between Nations is thus an incident of territorial possession. Empire is in fact a primary territorial right, and the Empire of a Nation is supreme *ratione loci* over every person and every thing within its territory. "Quicquid est in territorio, est de territorio[5]." Its operation, however, is sometimes suspended by Comity or by Compact, but a claim of extra-territoriality, or of immunity from the Law of the territory (*lex loci*), is strictly exceptional; the general presumption of the *Jus inter Gentes* being adverse to it. There are cases however in which the *Comity* of Nations has suspended the exercise of certain rights of Empire (Jura imperii)[6] so uniformly, that a *Custom* has grown up whereby the *exception* has acquired the character of *Law*; as for instance in regard to the immunity from the *Lex Loci*, which is extended to the Public Ministers of Foreign Princes, notwithstanding they should be permanently resident within the territory of another Nation, and thereby *normally* subject to its Empire.

Empire distinct from dominion.

§ 143. The Right of Empire or Jurisdiction is distinguished from the Right of Dominion or Property. When a Nation takes possession of a vacant tract of land, it acquires under ordinary circumstances the Dominion or fullest Right of Property over it concurrently with the Right of Empire. "Si gens regionem quandam occupavit, omnis terra et quæ in ea

[4] Vattel, L. I. § 210.

[5] Heffter, § 67.

[6] Dominus territorii non permittere intelligitur peregrinis, ut in territorio suo versentur, vel ibidem commorentur, nisi sub hac conditione ut legibus loci subsint eorum actiones. Wolffii Jus Gentium, § 299. Grotius, L. II. c. 11. § 2.

sint, in dominio ipsius sunt[7]." This Right of Dominion or Property gives to a Nation a right to exclude all other Nations from the enjoyment of the territory of which it has taken possession, and its Right of Empire warrants a Nation to enforce its own sanctions against all who would intrude upon its territory. Although, however, the Right of Empire accompanies the Right of Property in the case of International Possession, they are not necessarily concurrent rights[8], but the Right of Empire may be enjoyed by a Nation over certain things, in which it is incapable of acquiring an absolute Right of Property. "Acquiri imperium potest, etsi res singulæ naturâ in dominium venire non possunt[9]."

Empire over things which cannot be appropriated.

§ 144. The Roman Jurists regarded certain things as incapable by nature of being appropriated. "Et quidem naturali Jure communia sunt omnium hæc, aer, aqua profluens, et mare, et per hoc litora maris[10]." It is obvious that the air, running water, and the sea, are not susceptible of detention, and consequently cannot be physically reduced into possession, so as to give rise to that permanent relation, which is implied in the Juridical notion of property. "Again Nature does not give to man a right of appropriating to himself things which may be innocently used, and which are inexhaustible and sufficient for all. For since those things, while common to all, are sufficient to supply the wants of each, whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably seek to wrest the bounteous gifts of Nature from the

[7] Wolff, Jus Gentium, § 274.

[8] Gunther, L. II. § 17.

[9] Quamquam autem plerumque uno actu quæri solent imperium et dominium, sunt autem distincta. Grotius, L. II. c. 3. § 4. 2.

[10] Just. Inst. L. II. Tit. I. § 1.

parties excluded[11]. There is accordingly no warrant of Natural Law for an absolute Right of Property in the running water of rivers (aqua perennis) any more than in the tidal water of the sea. But if the free and common use of a thing of this nature (namely which is of itself inexhaustible) be prejudicial or dangerous to a Nation, the care of its own safety will entitle it so far, and so far only, to control the use of it by others, as to secure that no prejudice or danger result to itself from their use of it. A Nation may accordingly have a *Right of Empire* over things which are nevertheless by nature *communis usûs*, and over which it cannot acquire an absolute *Right of Property;* as, for instance, over portions of the High Seas, or over rivers which form the boundary of its territory. The limits, within which the safety of a Nation warrants such an exercise of Empire, will be considered hereafter.

Empire over Territorial Rivers.

§ 145. A river, of which both banks are in the possession of one and the same Nation, may be regarded as a stream of water contained in a certain channel, which channel forms part of the territory of the Nation[12]. Such water accordingly, whilst passing through the territory of a Nation, is subject, like all other things within its territory, to the Empire of the Nation, and those who navigate upon it are subject to the Jurisdiction of the Nation *ratione loci.* The exercise of the Right of Empire over such a river by a Nation, whilst it flows through its territory, does not in any wise militate against the use of it as running water by other Nations, or conflict with the exercise of their corresponding Right of Empire over it, whilst it flows through their respective territories. We find accord-

[11] Vattel, L. I. § 280.
[12] Grotius de Jur. B. et P., L. II. c. 14. § 7.

ingly by the practice of Nations, that a Nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other Nation from the use of the stream, whilst it is passing through its territory, and this rule of Positive Law holds good whatever may be the breadth of a river. Moreover, the fact, that other Nations have freely navigated the stream before both banks of a river have come into possession of one and the same Nation, will not control the operation of this rule. Thus the recognition of the Independence of the Seven United Provinces by the peace of Munster on the part of Spain[13] (Jan. 30, 1648) carried with it the recognition of their right to close the navigation of the River Scheldt in all its branches within their territory. The same rule was applied to the stream of the Mississippi, below the point where the Southern Boundary of the United States struck that river, by Spain, after the Spanish Nation had acquired possession of both banks, although the navigation of the entire river had been previously common to all Nations whilst it formed a common Boundary of the French and British Possessions. The United States of North America contested at first the claim of Spain, but were fain to conclude the dispute by the Convention of San Lorenzo el Real[14], under which the free navigation of the entire river was conceded by Spain to citizens of the United States in common with subjects of Spain. At a subsequent period after Louisiana and Florida had been ceded to the United States, the entire river became included within the Territory of the North

[13] Schmauss, Corp. Jur. Gent. I. p. 618.
[14] Martens, Recueil, VI. p. 146.

American Union; the United States have thereupon asserted in their turn their Right of Exclusive Use over the entire stream, and have, in virtue of their Right of Possession, prohibited all other Nations from the navigation of any portion of the river. In a similar manner Great Britain maintains her exclusive right over the stream of the St. Lawrence during its passage through British Territory. By the Treaty, however, of Washington[13] (5 June, 1854), Great Britain has agreed, that the citizens and inhabitants of the United States shall have the right of navigating the river St. Lawrence and the canals in Canada used as the means of communication between the great Lakes and the Atlantic Ocean, as fully and freely as the subjects of her Britannic Majesty, it being understood, however, that the British Government retains the right of suspending this privilege on giving due notice thereof to the Government of the United States.

It may be observed in regard to this *Right of Exclusive Use*, which a Nation being in possession of both banks exercises over the stream of a navigable river, that a Nation so established has a physical power of constantly acting upon the stream, and of excluding at its pleasure the action of any other Nation, which power constitutes Juridical Possession. On the other hand the stream, whilst it is included within the territory of a Nation, cannot be considered to be destined by the Creator to continue open to the common use of mankind any more than the banks and adjacent lands, which have been appropriated and so withdrawn from common use. Nature would

[13] Martens, N. R. Gén. Tom. XVI. p. 502. This Convention is to remain in force for ten years, and further, until the expiration of twelve months after either Nation shall give notice to the other of its wish to terminate the same.

thus appear to have interposed neither a material obstacle nor a moral impediment to the *exclusive use* of a navigable river on the part of a Nation within certain territorial limits. That a river, whilst it flows through the territory of a Nation, should be regarded in any other light than as part of its Possessions, would seem to be inconsistent with the integrity of its territory, whilst it might be incompatible with its security, if the use of the river were not subject to its exclusive control.

Modifications by Compact.

§ 146. The exercise on the part of a Nation of its right to exclude other Nations from the use of its territorial waters has often been modified either expressly or implicitly by Compact. Thus Spain, being in possession of both banks of the river Mississippi for some distance upwards from the sea, conceded to the citizens of the United States by the Treaty of San Lorenzo el Real, (anno 1795,) the free navigation of the river, from its source to its mouth, reserving however the power to extend the same privileges to the subjects of other Powers by a Special Convention. In a similar manner it was agreed between Great Britain and the United States by the Eighth Article of the Treaty of Paris (17th Sept. 1783)[14], "that the navigation of the river Mississippi, from its source to the Ocean, should for ever remain free and open to the subjects of Great Britain and the citizens of the United States." "The subsequent acquisition," writes Wheaton, "of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the Treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the Treaty of Ghent

[14] Martens, Recueil, III. p. 559.

in 1814, the right of navigating the Mississippi is now vested exclusively in the United States [15]."

Empire over Frontier Rivers.

§ 147. A Nation which has established itself on one of the banks of a river, prior to the occupation of the opposite bank by any other Nation, may, with a view to its own security, reduce the channel of the river into possession without occupying the other bank [16]. It may for this purpose either station an armed fleet upon its waters, and thereby occupy the fairway of the river, or it may erect armed forts upon its own bank, and thereby command the fairway, and in either case it will be able effectively to exclude other Nations from the use of the river. Thus the Romans became sole masters of the Rhine, the Danube, and some other rivers, because the barbarians who inhabited on the other bank having no boats, the Romans constantly kept what they called "naves lusoriæ" upon them. So likewise the Republic of Paraguay in South America has established its possession of the channel of the river Paraguay which separates the territory of Paraguay from El Gran Chaco [17], and the Republic of Paraguay claims by right of established possession to exclude not merely the Indians of El Gran Chaco who inhabit the opposite bank, but Nations of European origin, such as the Brazilian Nation which possesses the upper part of the river, and the Argentine Confederation which is in possession of the lower part of the river, from navigat-

[15] Wheaton's Elements, Part II. c. 4. § 18.

[16] Wolffii Jus Gentium, § 106. Vattel, Droit des Gens, L. I. § 266.

[17] The Indians of the Chaco have no canoes. The river throughout the extent of Paraguay is occupied by a river-police stationed by the government of Paraguay on board of *guardias* and *piquetes*, each occupied by from six to twelve men. La Plata and the Argentine Confederation and Paraguay, by Thomas J. Page, U. S. N. London, 1859, p. 108.

ing that portion of the river which separates the Republic of Paraguay from the territory of the warlike Chaco tribes[18]. That a Nation which is settled on one of the banks of a river may nevertheless have a Right of Empire over the entire river, is thus noticed by Grotius. "But though, as I have said in case of any doubt, the jurisdictions on each side reach to the middle of the river that runs between them, yet it may be, and in some places it has actually happened, that the river belongs wholly to one party, either because the other Nation had not yet possession of the other bank till later, when their neighbours were already in possession of the whole river, or else because matters were so stipulated by some treaty[19]." The sanction, which Usucaption or established possession in such a case gives to the claim of a Nation to exclude other Nations from the use of a river, has not been overlooked by Vattel: "A long and undisputed possession establishes the Right of a Nation, otherwise there could be no peace, no stability between them, and notorious facts must be admitted to prove Possession. Thus, when from time immemorial a Nation has without contradiction exercised the Sovereignty upon a river which forms its boundary, nobody can dispute with that Nation the supreme dominion over it[20]."

Treaty Stipulations as to Frontier Rivers.

§ 148. Grotius has remarked that a Riverain State may have jurisdiction over the entire channel of a river, to the exclusion of other Riverain States, "because matters have been so stipulated by some Treaty." A remarkable instance of this occurs in the Treaty of

[18] The warlike Chaco tribes have alone, amid the degradation of the native races upon the American Continent, defied for more than three centuries the power of the white man.

[19] De Jure B. et P., L. II. c. 3. § 18.

[20] Droit des Gens, L. I. § 166.

St. Germain en Lay (29 March, 1679), whereby the King of Sweden ceded to the Elector of Brandenburg all his possessions on the right bank of the Oder, retaining his possession of the left bank, and whereby it was further expressly provided, that the river Oder itself should for ever remain under the Sovereignty of the Crown of Sweden, and that the Elector of Brandenburg should not erect any fortifications upon the bank ceded to him [20]. This exceptional arrangement had its origin most probably in the previous dispositions of the Treaty of Westphalia, by which the Sovereignty of the Crown of Sweden over the river Oder was secured for ever, and with which, as forming part of the Public Conventional Law of Europe, the Treaty of St. Germain en Lay was made to accord.

Treaties, whereby a river has been ceded in its entirety (en entier), have been held to transfer not only the possession of the entire channel of the river, but both its banks as inseparable accessories to the river. Thus by the Treaty of Warsaw (18 Sept. 1773), Poland agreed that the entire river Netze should belong to Prussia, and Prussia contended, and was ultimately successful in her contention, that the cession of the entire river implied the cession of the stream and both its banks. By a like interpretation, Sweden having obtained under the Treaty of Osnabruck (24 Oct. 1648) the cession of the entire river Oder from the Emperor of Germany, was held to have acquired thereby possession of a margin of two German miles on the further bank, as an inseparable accessory to

[20] La rivière de l'Oder, suivant les dispositions des traités de Westphalie, demeurera toujours en souveraineté au Roi et à la couronne de Suède, et il ne sera pas libre au dit Electeur de Brandenbourg d'ériger aucune forteresse ou de fortifier aucune place dans l'entrevue du Pays qui lui est cédé par le présent Traité.—Dumont, Corps Diplomatique, XIII. p. 408.

the stream. To what extent the use of the land on the bank or banks of a river may be regarded as accessory to the use of the stream, has been a subject of dispute. Prussia, in her dispute with Poland respecting the effect of her cession of the river Netze *en entier*, went so far as to claim all such portions of the opposite bank as the waters of the river in a state of inundation overflowed, as well as the marshes caused by such inundations, which claim Gunther [21] considers to have been in conformity with usage.

It is obvious however that such a principle, if generally applied, might lead to great complications. A different and a more definite principle was adopted by Russia in the Treaty of Adrianople concluded with the Ottoman Porte [22] (24 Sept. 1829). By this Treaty, the Porte in effect ceded the river Danube between the Pruth and the Black Sea in its entirety to Russia, for it was provided by Article III, that the frontier line should follow the course of the Danube from the confluence of the Pruth to the St. George's mouth, leaving all the Islands in possession of Russia, and the right bank of the Danube in possession, as heretofore, of the Porte. But it was further agreed that from the point where the St. George's branch separated from the Sulina branch of the Danube, the right bank of the river should remain uninhabited for the distance of two hours [23], and that no establishment of any kind should be formed upon it within that limit. Such a provision, whilst it effectively secured the navigation of the river from any control on the part of the Porte by virtue of its possession of the southern bank of the Danube, did not tend in any way to impair the

[21] Gunther, t. II. § 14.

[22] Martens, N. R., t. VIII. p. 144.

[23] 'Deux heures,' probably about two German miles, 'Zwei Stünde.'

integrity of the Porte's possession of that bank. On the other hand, the rule of interpretation, whereby the cession of a river *en entier* implies the cession of both its banks, as contended for by Prussia in the case of the river Netze, might operate to deprive a Nation of an important land-frontier, although it has in terms only ceded possession of a water-frontier.

Conventional Law as to the great rivers of Europe.

§ 149. It was formerly the policy of Nations to consider rivers, equally with mountains, to be natural barriers, and to regard them as turned to the most useful purpose when employed as lines of international demarcation. Thus Grotius, borrowing a term of Law from the Civilians, writes, "But in any doubt of the bounds of a State, those lands that reach to some river are to be reckoned as *arcifinious*, because nothing is so proper to distinguish jurisdiction as that which is of such a nature that it is not easily passed over [24]." The exclusive right to the use of a river has been accordingly maintained with great jealousy by Nations, as an important international right, seeing that a river might under such circumstances be converted into a fortified frontier. The Conventional Law of Europe has, in modern times, been adapted to larger and less selfish views. Thus the great navigable rivers of the Continent, which in their passage to the Ocean intersect various lands, sometimes passing through Territory in the exclusive possession of one and the same Nation, at another time forming a common boundary between the Territories of two or more Nations, and of which the navigation has been heretofore in some parts totally impeded, and in others so burdened with tolls, that they had ceased to be available as highways of general commerce, are now regarded as the instruments of Nature to cement the

[24] De Jure B. et P., L. II. c. 3. § 17. 2.

peaceful relations of mankind, by facilitating their mutual intercourse. It was one of the most beneficent arrangements of the Congress of Vienna, that the Powers there assembled agreed, that the navigable rivers which traversed or separated their respective States, should be open for commercial purposes to the navigation of vessels of all Nations, from the places where they became navigable to their mouths, subject to an uniform system of police and tolls, to be settled by common accord[25]. The Treaty of Paris (30 March, 1856) has applied to the river Danube and its mouths the same principles of Law which had been applied by the Christian Powers assembled at Vienna in 1815 to the rivers traversing or separating their respective territories, and has recorded that this arrangement with the Ottoman Porte forms part of the Public Law of Europe. The Right of Empire over any of the great arterial Rivers of Europe has thus ceased to confer any exclusive privilege of navigation upon the Nation which enjoys that Right. On the contrary, each Riverain State is under a Conventional obligation to remove all obstacles to navigation, which may arise in the bed of the river within its Territory, and to maintain the banks and towing-paths and other accessories to the navigation in such a condition as will best facilitate the circulation of the merchant vessels of all Nations.

§ 150. A different system, however, was adopted under the Treaty of Paris for removing the physical obstacles to the Free Navigation of the Danube. An European Commission was appointed under Article XVI of that Treaty, in which Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey were each represented by one delegate. The business of

[25] Martens, N. R. II. p. 428.

this Commission was to designate and to cause to be executed the works necessary below Isaktcha, to clear the mouths of the Danube, as well as the neighbouring parts of the Sea, from the sand and other impediments obstructing their navigation, and for the purpose of defraying the expenses of such works and of the establishments ancillary to them, power was given to this Commission to fix dues of a suitable rate leviable on the flags of all nations under conditions of perfect equality. Further, under Article XVII of the same Treaty, a Riverain Commission was to be appointed, in which Austria, Bavaria, the Ottoman Porte, and Wurtemberg were each to be represented by one delegate, with whom was to be associated a Commissioner from each of the Danubian Principalities, whose nomination was to be approved by the Porte. This Riverain Commission was intended to be permanent, and its functions were to be: 1. To prepare regulations of navigation and of river-police. 2. To remove impediments, of whatever nature they might be, which might still prevent the application to the Danube of the principles of law sanctioned by the Treaty of Vienna. 3. To order and to cause to be executed the necessary works throughout the whole course of the River. 4. After the dissolution of the European Commission to maintain the mouths of the Danube and the neighbouring parts of the Sea in a navigable condition. The next following, Article XVIII, placed on record an understanding amongst the Signatory Powers that the European Commission would have finished its task, and the Riverain Commission would have completed the works described in Article XVII within a period of two years, whereupon the Signatory Powers having been assembled in Congress, and

having been informed of that fact, after having placed it on record, were to pronounce the dissolution of the European Commission and thenceforth the permanent Riverain Commission was to enjoy the same powers which the European Commission had up to that time exercised. In pursuance of the provisions of Article XVII already mentioned, Delegates of the Four Riparian Powers, to wit, Austria, Bavaria, Turkey, and Wurtemberg, with whom were associated a Commissioner from each of the Danubian Principalities, to wit, Moldavia, Servia, and Walachia, assembled at Vienna, with a view to give effect on their part to the provisions of the Treaty of Paris; and with that object they executed an Act of Navigation on 7 November, 1857[26], under which, amongst other matters, the navigation of the Danube from the place where the river first becomes navigable down to the Black Sea was declared to be entirely free to the merchant vessels of all Nations, subject however to regulations of river-police. This Act, however, remained inoperative until 8th March, 1866, when it underwent a slight modification embodied in two Annexes, and was thereupon approved by the Signatory Powers of the Treaty of Paris[27], assembled in Conference.

§ 151. It had been contemplated by the Signatory Powers of the Treaty of Paris of 1856, as above mentioned, that the duties of the European Commission of the Danube would have been completed before the expiration of two years, and that the Riverain Commission would by that time have replaced it. The engineering difficulties, however,

[26] British and Foreign State Papers, vol. lvii. p. 786.
[27] Ibid., vol. lvii. p. 546.

and the expenses of the task imposed upon the European Commission proved to be much greater than had been anticipated, and after the Signatory Powers of the Treaty of Paris had consented in 1871 to release Russia from her treaty-engagements in respect of the neutralisation of the Black Sea, they agreed to prolong the action of the European Commission for twelve years, that is to say, to 24 April, 1883, and with regard to the Riverain Commission, it was not to be assembled without a previous understanding amongst the Riparian States. The subsequent war between Russia and the Porte gave rise to new territorial arrangements on the banks of the Danube. Under Article LII of the Treaty of Berlin of 1878, all the fortresses on the banks of the Danube, from the Iron Gates to the Sea, were to be rased to the ground, and no armed vessel was to navigate the Danube below the Iron Gates with the exception of light vessels for the purposes of river-police and the levying of custom-dues. The waters of the Lower Danube, that is of the River below the Iron Gates, were thus neutralized in the sense in which that word has been applied by the negotiators of the Treaty of Paris to the waters of the Black Sea. Two light-armed vessels, however, which each of the Signatory Powers was entitled under that Treaty to keep at the mouths of the Danube, were to be allowed to ascend the river from time to time as high up as Galatz. The European Commission of the Danube, in which Roumania was henceforth entitled to be represented (Article LIII), was to continue to exercise its functions as far up as Galatz in complete independence of every territorial authority, and it was authorised in conjunction with delegates from

the Riparian States to make regulations for the navigation of the River from Galatz up to the Iron Gates, which were to be in harmony with those already made and applied to the River below Galatz down to the Sea. The European Commission was also authorised to take measures to secure that a lighthouse should be maintained on the Isle of Serpents opposite the Delta of the Kilia branch of the Danube. Further, the execution of the works necessary to remove the obstacles to the safe navigation of the Danube above the Iron Gates was entrusted to Austria-Hungary, and the expenses of such removal were to be defrayed by a provisional tax to be approved by the European Commission. It need not be matter of surprise that it should have been found to be a work of much time and difficulty to carry into effect the provisions of the Treaty of Paris for opening to all Nations the Navigation of the Danube, when it is borne in mind that the provision of the final Act of the Congress of Vienna of 1820, declaring the navigation of the Rhine to be free from the point where it became navigable unto the Sea, did not obtain full effect before 1831, when the Government of the Netherlands agreed, by a Convention concluded at Mayence [28] on the 31st March of that year between all the Riparian Powers, to allow to the vessels of commerce of all nations the liberty of passing through the waters of the Leck and the Waal, with a further provision that in case the passages to the main sea by those two outlets of the Rhine should at any time

[28] The Government of the Netherlands could not concur in the interpretation given by the other Signatory Powers of the Final Act to the words "jusqu'à la mer." The Convention of Mayence agreed to replace these words by the phrase "jusque dans la mer," bis an die See. Martens, N. R. IX. 252.

become unnavigable, other water-channels equally convenient should be declared open to the navigation of vessels of commerce. The same Convention regulated the charges to be made on vessels and merchandize passing through Dutch waters, and also the tolls payable at the different ports of the Riparian States of the Upper Rhine. It will thus be seen that the free navigation of the great arterial Rivers, separating or traversing the territory of the different States of Europe, has been placed under the Ægis of the European Concert of Public Law. This principle was affirmed for the first time at the Congress of Vienna in 1815. It was re-affirmed at the Congress of Paris in 1856, when the Ottoman Empire was admitted into the European Concert. It has been for a third time affirmed at the Congress of Berlin in 1878, when Servia and Roumania were admitted into the Family of Nations, and when Roumania was declared to be entitled to succeed to the rights and obligations of the Ottoman Porte in respect of the territory on the southern bank of the Danube ceded to her as an independent State. Further, by the same Treaty the European Commission of the Danube, in which Roumania was to be represented, was maintained in the exercise of its functions as high up the river as Galatz independent of every territorial authority. By a subsequent arrangement of the Conference of London, embodied in a Treaty of 10 March, 1883, the powers of the European Commission of the Danube have been prolonged for twenty-one years from 24 April, 1883, and its jurisdiction has been extended from Galatz to Ibraila[29]. "At the expiration of the above-mentioned period the powers

[29] Parliamentary Paper, Danube, No. 2 (1883). Mémorial Diplomatique, 19 Mars, 1883.

of the European Commission are to continue in force by tacit prolongation for successive terms of three years, unless one of the High Contracting Parties should notify one year before the expiration of one of those terms of three years the intention of proposing modifications in the Constitution or in the powers of the Commission." This latter provision of the Treaty seems to have been rather inconveniently worded, as it might appear under one interpretation of it to authorise any one of the High Contracting Parties to terminate the tacit prolongation of the European Commission at its pleasure by giving notice of a modification of it, but it may be presumed that the other High Contracting Parties will assert their right, if they should reject any such proposed modification in the Constitution or the Powers of the Commission, to prolong its existence *toties quoties*.

§ 152. The work of adjusting the navigation of the Danube and its Mouths to the principles of law established by the Congress of Vienna of 1815, as applicable to Rivers which separate or traverse different States, is still incomplete, notwithstanding that the Riverain Commission commenced its labours promptly, and agreed as already mentioned to an Act of Navigation on 7 Nov. 1857, which was to come into operation 1 Jan. 1858. The European Commission, on the other hand, has not been idle. Its work was reviewed in 1865, and was approved by a Public Act of the Signatory Powers of the Treaty of Paris of 1856, signed at Galatz on 2 Nov. 1865. An additional Act, to which Roumania was made a party, has been recently signed at Galatz on 28th May, 1881, extending the Powers of the European Commission as high up as Galatz, in order to meet the territorial

changes established by the Treaty of Berlin of 13 July, 1878. Still more recently the powers of the European Commission have been extended to Ibraila, whilst the portions of the Kilia branch of the Danube, where both banks belong to one and the same Power, have been withdrawn from its control, the other portions being still made subject to the Regulations in vigour in the Soulina branch, under the superintendence of the Russian and Roumanian members of the European Commission. The Treaty of London of 1883, to which the Signatory Powers of the Treaty of Berlin are parties, has sanctioned certain Regulations for the navigation and river-police, applicable to that part of the Danube which is situated between the Iron Gates and Ibraila. Further, it has placed the execution of those Regulations in the hands of a "Mixed Commission of the Danube," in which Austria-Hungary, Bulgaria, Roumania, and Servia are to be represented each by one Delegate, and a member of the European Commission, designated for a period of six months, according to the alphabetical order of the States, is also to take part in the deliberations of the Commission with all the rights enjoyed by the other Delegates. The Powers of this Mixed Commission of the Danube are to be of equal duration with those of the European Commission. It will thus be seen that the navigation of the Danube is placed under three distinct systems of law. The Mouths of the River and the Lower portion of it as high up as Ibraila are under the Control of the European Commission including Roumania, subject to a modification of its powers in certain portions of the Kilia branch. The Middle Danube, which includes the waters above Ibraila

as far as the Iron Gates, will be under the Mixed Commission of the Danube, over which the Presidency is assigned by the Treaty of London, 1883, to the Delegate of Austria-Hungary, and its Sittings are to be held at Giurgevo twice in each year. The Upper Danube, on the other hand, above the Iron Gates and the Cataracts, will be under the superintendence of the Riverain States in accordance with the general Principles of the Public Law of Europe, the freedom of its navigation, however, being assured to the Flags of all Nations.

The Thalweg or Midchannel of a River the Boundary of Conterminous States.

§ 153. If the opposite banks of a navigable river are in the possession of two Nations, and neither Nation can prove that itself, or the Nation from which it may have derived its title, was established on the one bank prior to the occupation of the other bank by the other Nation, each will have a Right of Empire and Dominion over the river as far as the *midchannel* or *Thalweg*. "Pour ce qui est des fleuves et lacs frontières, dont la rive opposée est également occupée, leur milieu, y compris les îles que traverse la ligne du milieu, sépare ordinairement les territoires. Au lieu de cette ligne on a nouvellement choisi pour frontière le *Thalweg*, c'est à dire le chemin variable que prennent les bateliers, quand ils vont aval, ou plutôt le milieu de ce chemin [30]." Grotius and Vattel speak of the *middle of the river* as the line of demarcation [31] between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary of the *Midchannel*. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation; and the boundary line will be the

[30] Klüber, Droit des Gens, § 133.

[31] Grotius, L. II. c. 3. § 18. Vattel, L. c. 22. § 266.

line drawn along the surface of the stream corresponding to the line of deepest depression of its bed. Thus we find in the Treaty of Argovie, (17 Sept. 1808,) concluded between the Grand Duchy of Baden and the Helvetic Canton of Argovie [32], that the *Thalweg*, or water-frontier line, is defined to be "the line drawn along the greatest depth of the stream," and as far as bridges are concerned, "the line across the middle of each bridge." The islands on either side of the Midchannel are regarded as appendages to either bank [33]; and if they have once been taken possession of by the Nation to whose bank they are appendant, a change in the Midchannel of the river will not operate to deprive that Nation of its possession, although the water-frontier line will follow the changes of the Midchannel—"Dans les fleuves navigables, c'est le courant du fleuve qu'on a communément en vue, en convenant de prendre le milieu pour limite. Cette limite change donc, si le courant change: ce qui cependant n'influe pas sur la propriété des autres parties une fois acquise. Mais dans le cas où un fleuve changerait totalement le lit, le lit desséché resterait partagé entre les deux nations, comme l'était le fleuve. Les simples atterrissemens n'altèrent pas la ligne, qui sert de limite [34]." "A river," writes Grotius, "that separates two Empires is not to be considered barely as water, but as water confined within such and such

[32] Martens, N. R. T. I. p. 140.

[33] Such is the general law, but by treaty the midchannel may be made the water-boundary, yet all the islands in the river belong to one Power. Thus by the Convention of 9 Feb. 1776, between the King of Poland and the Empress Maria Theresa, all the islands in the river Vistula, within the limits of the Convention, with the exception of that in which the town of Casimir is situated, were ceded to her Imperial and Royal Majesty, whilst half the bed of the river was declared to belong to each Power. Martens, Recueil, T. II. p. 127.

[34] Martens, Précis du Droit des Gens, § 39.

banks and running in such and such a channel; therefore the addition, subtraction, or such changes of its particles, as allow the whole to subsist in its ancient form, allow the river to be considered as the same. But if the form of the whole be changed at once, it will be quite another thing; and consequently, if a river is dammed up above, and a passage made to convey the water another way, the river ceases to be. So in case a river should force its way through some unusual passage, and entirely forsake its former channel, it is no longer the river that it was before, but a new river. So, too, if a river should have become dried up, the middle of the channel would remain, as before, the boundary of Empire between two Nations, because the intention of each Nation must be presumed to take the river for the natural limit of their lands, but if the river should at any time cease to be, then to possess respectively what they had before: the same rule is to be observed if the channel should be changed [35]."

Right of Alluvion.

§ 154. When a river is the boundary between two Nations, whether its channel remains common to the inhabitants of either bank, or whether each Nation possesses half of it, the respective rights of the two Nations are not in any wise changed by *alluvion*, that is by a gradual addition of soil made by the current of the river to the bank on either side [36]. If therefore it happens that by the natural effect of the current, one of the two banks receives an increase of soil, while the river gradually encroaches on the opposite bank, the river still remains as heretofore the boundary between the two Nations, and notwithstanding the progressive changes in its course,

[35] De Jure B. et P., L. II. c. 3. § 17.

[36] Grotius, L. II. c. 3. § 16. Vattel, L. I. § 268, 269.

each retains over it the same rights as heretofore. So that, if for instance its possession be equally divided between the owners of the opposite banks, the midchannel, or *Thalweg*, although its distance from the respective banks may be no longer the same by reason of the alluvial increase of the one bank and the denudation of the other bank, continues nevertheless to form the line of demarcation between the two Nations.

Prescriptive Rights over Rivers.

§ 155. A river may belong to one Nation and another Nation may have an incontestable right to navigate it, in which case the former cannot erect upon the river any work, which will entirely interrupt and render it unfit for navigation. The right to navigate such a river may have been acquired by the Nation, which is not in possession of the river, either by prescription founded on the long acquiescence of the other Nation, if it ever had the right to exclude other Nations from the navigation, or by a privilege granted by a common paramount Sovereign. It may happen, that conterminous Independent States, separated by a river, have been subject in former times to a common paramount Lord or Sovereign, such for instance as the Princes and Free Cities of Germany formerly recognised in the Roman Emperor of the Germans, who in virtue of his Supremacy could rightfully grant to them by Charter or otherwise the exercise of dominion and jurisdiction over a river within the Empire. Thus a Right of *Condominium*[37] over the Rhine was granted by the Roman Emperor of the Germans to the Electors of Mayence, Trèves, Cologne, and the Elector Palatine, and a Right of Supreme Dominion over the Maine was similarly granted to the Elector of Mayence. In an analogous manner the

[37] Gunther, T. II. § 14.

right of levying tolls, which was an Imperial Right, was granted to Riverain States of the Empire, and tolls have been accordin ly levied by them upon vessels navigating the rivers which bound or intersect their territory ; at the same time that exceptional privileges of freely navigating such rivers were granted by the same Supreme Authority to one or more other States of the Empire, and have continued to be enjoyed by them since they have become Independent Nations.

The Stade or Brunshausen Toll.

§ 156. The Stade or Brunshausen Toll, levied by Hanover on the vessels and goods of Foreign Nations ascending the river Elbe from the Sea, was an instance of the Right of Empire exercised under qualifications. The origin of this toll is lost in antiquity. The earliest document in which it is mentioned, is a charter of the Emperor Conrad II, dated l`ecember 10, 1038, which grants the then existing toll levied near the place of Stade to the Archbishops of Bremen, which Grant was confirmed by the succeeding Emperor Henry III, on 13 May, 1040. His successor the Emperor Henry IV, annexed the County of Stade with all the tolls and duties then levied to the Archbishopric of Bremen. The right thus conveyed existed in all its generality until the Emperor Frederic I, on the 7th May, 1189, granted to the citizens of the old Town of Hamburgh, at the instance of Count Adolphus of Schaumburg, the privilege of their ships and goods passing free of the Stade Toll. The exemption enjoyed under this privilege was vigorously contested by the Archbishop, as an infringement upon a vested Right and also upon the property of the Church, but it was ultimately established, on the 8 Dec. 1268, by the superior might of the Hamburgh Burghers, since which time the right of free navigation

has been enjoyed by the Burghers of the old Town of Hamburgh down to the present day. By the peace of Osnabruck, (8 Sept. 1648,) Bremen, which had been erected into a Duchy, was transferred to Sweden, and the Stade Toll was levied by the King of Sweden, as Duke of Bremen, down to 1712, when Denmark wrested from Sweden the Duchies of Bremen and Verden, and ceded them to the Elector of Hanover. At the conclusion of the subsequent peace (9th Nov. 1719) the Elector of Hanover was formally invested with the two Duchies by the Emperor of Germany, in the same way as the King of Sweden had been invested after the peace of Osnabruck. From this investiture Hanover claimed her right to levy the Stade or Brunshausen Toll. At the time when the Stade Toll was established, the Elbe was a river of the German Empire, and the levying of river tolls was amongst the rights, which by the law and customs of the Empire appertained to the Imperial Crown. It was competent therefore to the Emperor Charles the Great to establish passage-duties upon vessels entering the mouth of the river Elbe, and it is probable that the then frequented harbour of Stade was one of the places selected by that Emperor. It was equally competent for a subsequent Emperor to grant the Duchy of Bremen with all the tolls therein levied to a Prince of the Empire, and to sanction the ultimate transfer of the Bremen Fief with all its rights to the Elector of Hanover. Upon the devolution of the Supremacy of the Emperor and the Empire to the immediate vassals of the Imperial Crown, the Elector of Hanover and the Free City of Hamburgh became Independent Sovereign Powers, and they continued to enjoy henceforth, in such character, the respective rights and privileges in regard to the navigation of the river

Elbe, which they had heretofore enjoyed as immediate vassals of the Imperial Crown. The King of Hanover continued to levy toll upon all vessels entering the river Elbe from the sea, with the exception of vessels belonging to Burghers of the old Town of Hamburgh. The right of Hanover and the privilege of the old Town of Hamburgh had equally a lawful origin, and both had been exercised for so many centuries, that they had acquired the sanction of long established custom as against each other and against other Nations.

After the Powers assembled at the Congress of Vienna had agreed, that the tolls to be taken on the great navigable rivers of Europe should be settled by a common accord amongst the Riverain Powers, the Commissioners of the Elbe-bordering States assembled at Dresden, (3 June, 1819,) for the purpose of settling a scheme of Elbe-tolls. On this occasion Hanover appears to have contended, that the Stade Toll was a *Sea-toll*, as distinguished from a *River-toll*; and consequently was not within the scope of the Treaty-Engagements of Vienna. A subsequent and more careful investigation induced Hanover to admit that the Stade Toll was a River-Toll, and it was accordingly regulated by the Elbe-bordering States under the Convention of Dresden [38], (30 August, 1843.) This toll accordingly, which was originally a territorial toll levied under the authority of the Roman Emperor of the Germans upon all vessels coming from the Sea into a river of the Germanic Empire, having been regulated by a Convention in pursuance of the Treaty-Engagements of Vienna, had thus been sanctioned by the Conventional Law of Europe. The Stade Toll had beyond all doubt a

[38] Martens, N. R. Général, V. p. 530.

rightful origin, and its rightful origin secured its recognition; unlike the Glückstadt toll, which the King of Denmark, as Duke of Holstein, attempted to levy in the Seventeenth Century upon all vessels passing by the Port of Glückstadt, but which the English and Dutch nations [39], and above all the citizens of Hamburgh, successfully resisted. The Stade Toll has now become a matter of history. It was suppressed in respect of European vessels in pursuance of a general European Treaty signed at Hanover on 22 June, 1861, and in respect of vessels under the flag of the United States of America under a Convention between the United States and Hanover of 6 November, 1861. In both cases compensation was made to Hanover for the sacrifices imposed upon her.

[39] Treaty of 1645. Schmauss, Corp. Jur. Gent. I. p. 356. Lord Molesworth's Account of Denmark, anno 1692.

CHAPTER X.

RIGHT OF JURISDICTION.

Incidents of the Right of Empire—National Sovereignty properly Territorial—The Jus Civile of a State operative only within its Territory—The Comity of Nations sometimes gives effect to Foreign Laws—Personal, Real, and Mixed Statutes—Growth of Private International Jurisprudence—Exceptional position of Europeans whilst resident amongst Asiatic Nations—Personal Actions of Foreigners—Extra-territoriality of certain Foreign Persons and Things—Merchant Vessels subject to the Territorial Law—Right of Emigration—Domicil the criterion of National Character—Jurisdiction and Remedies—Comity of Nations in regard to Personal Property—Domicil of Origin and Domicil of Choice.

Incidents of the Right of Empire.

§ 157. THE Empire of a Nation within its own territory is of Natural Right exclusive and absolute: it is susceptible of no limitation not imposed by the Nation itself, for any restriction imposed upon its exercise, deriving force from an external authority, would imply an impairment of a Nation's Independence to the extent of that restriction, and an investment of Sovereignty to the same extent in that Power which had imposed such restriction. All exceptions, therefore, to the free exercise of the Right of Empire by a Nation within its own territory must be derived from the consent of the Nation itself.

The Right of Civil and Criminal Legislation in respect of all property and persons within the territory of a Nation is an incident of the Right of Empire. It follows, therefore, that the Laws of every Nation bind of Natural Right all property situate within its territory, as well as all persons resident therein, whether they be natives or strangers, and that they control and regulate all the acts done or contracts entered into within its limits.

Every Nation has accordingly an absolute right to order the conditions, under which Real or Personal Property situate within its territory may be held or transferred, as well as to determine the capacity of all persons resident therein to enter into Contracts, as well as the formalities requisite to give legal effect to such Contracts, and the rights and obligations resulting thereupon; and finally to prescribe the conditions under which actions at law may be brought before its tribunals, and the remedies which may be administered in its Courts[1].

National Sovereignty properly Territorial.

§ 158. A Nation cannot by its Laws directly bind property which is beyond the limits of its territory, nor directly control persons who are not resident therein. This is a necessary consequence of the proposition advanced in the preceding section; for it would be inconsistent with the absolute character of Territorial Empire, if the Laws of a Nation could bind persons or property within the territory of another Nation, and so control the operation of the Laws of the latter Nation within its own territory. Rodenburg has accordingly observed, that no Sovereign Power can of Right set Law beyond the limits of its territory. "Constat igitur extra territorium legem dicere nemini licere; idque si fecerit quis, impune ei non pareri, quippe ubi cesset Statutorum fundamentum, cessant robur et jurisdictio[2]." Boullenois lays down a similar rule: "Of strict Right, all the Laws set by a Sovereign have only force and authority throughout his dominions[3]." Vattel concurs in this view, when he says, "The Empire united to the

[1] Boullenois, Traité des Statuts, T. I. p. 2, 3, 4. Story, Conflict of Laws, § 18, 19. Fœlix, Droit International Privé, § 9.

[2] Rodenburg, De Statutis, Tit. I. c. 3. § 1.

[3] Boullenois, Traité des Statuts, Principes Généraux, VI.

domain establishes the jurisdiction of the Nation within its territory. It is its province, or that of its Sovereign, to exercise Justice in all the places under its Empire; to take cognisance of the crimes that are committed, and the differences that arise in the country[4]." No law accordingly is operative, *proprio vigore*, beyond the limits of the territory of the State which has set it[5]. "There is no doubt," writes Chancellor Kent[6], "of the truth of the general proposition, that the Laws of a country have no binding force beyond its own territorial limits, and their authority is admitted in other States, not *ex proprio vigore*, but *ex comitate*, or in the language of Huber, "quatenus sine præjudicio indulgentium fieri potest," &c. Another eminent American authority, Chief Justice Parker, has recognised a similar doctrine in an elaborate Judgment, in the course of which he observes, that "the laws of a State cannot by any inherent authority be entitled to respect *extra-territorially*, or beyond the jurisdiction of the States which enact them; this is the necessary result of the Independence of distinct Sovereignties[7]."

Jus Civile of a State operative only within its territory.

§ 159. A difference of *kind* exists between the Authority which a Nation claims to bind its own natural born and naturalised subjects by its laws, in whatever country they may be, and the Right which a Nation possesses to control by its Laws all persons and property within its territory. The former authority is founded upon an implied or express Compact amongst the members of the Political Society which constitutes the Nation, and which Compact

[4] Droit des Gens, B. II. § 84.

[5] Martens, Précis du Droit des Gens, § 86.

[6] Kent's Commentaries, Tom. II. § 457.

[7] Blanchard v. Russell, 13 Massachusetts Repts. p. 4. cf. Bank of Augusta v. Earle, 13 Peter's Repts. p. 584.

has given rise to personal obligations on the part of the subject members towards the Sovereign Power; by virtue of which the Sovereign Power of a Nation may enforce its Laws against the subject members, as soon as they have returned within the limits over which its Right of Empire extends.

The latter Right is incidental to the Right of Empire; which is a Paramount Right within the limits of a Nation's territory. When, therefore, it is said that the Sovereign Power of a Nation may bind by its Laws its natural born or naturalised members everywhere, it must be understood that this attribute of *personal* Sovereignty is subordinate to the attributes of *territorial* Sovereignty; and that a Nation cannot enforce its Laws against its subjects whilst they are within the territory of another Nation. The exercise of personal Sovereignty on the part of a Nation over its own natural born and naturalised subjects, in respect of matters happening within the territory of another Nation, is not in point of Natural Right altogether clear upon any acknowledged principle; nor is the authority of a Nation to bind them, whilst they are within the territory of another Nation, by *personal Laws* recognised by other Nations. *Residence* is, in fact, the foundation of Jurisdiction under the Law of Nations. To be resident within the territory of a Nation is to be subject to its Jurisdiction; but Nations, from considerations of mutual Comity, do not apply the same Laws in all matters to persons who are only temporarily resident, as to persons who are permanently resident within its territory. The discretion, however, of a Nation as to the particular Law which shall be administered in its Courts is absolute, and it may decline to allow its Courts to give any effect to Foreign Law: on

the other hand, if it allows its Courts to administer Foreign Law in disputes between foreigners, or otherwise, it adopts tacitly the Foreign Law as its own for the settlement of such disputes.

The Comity of Nations sometimes gives effect to Foreign Law.

§ 160. The Laws of a Nation can only have effect or obligation within the territory of another Nation by virtue of the express or tacit consent of the latter. A Nation may prohibit the operation of all Foreign Laws, and refuse to recognise any rights growing out of them within its territory. On the other hand, it may prohibit some Foreign Laws, and give operation to others, either absolutely, or *sub modo*. If the Statute or Common Law of the Nation speaks clearly in such matters, it must be obeyed by all within the local limits of its authority. When both are silent, European Courts of Justice under the Comity of Nations presume the tacit adoption of the Laws of a Foreign Nation by their own Government, in matters which regard Foreign Interests, unless they are repugnant to its own policy, or prejudicial to its own interests. No Nation can be justly required to give up its own fundamental policy and institutions in favour of those of another Nation; much less can any Nation be required to sacrifice its own interests in favour of another Nation, or to enforce doctrines which in a moral or political view are incompatible with its own safety or happiness, or with its conscientious regard to justice and duty. It is therefore essentially a question of *Comity* between Nations, to what extent effect shall be given to Foreign Law, and all questions of *Comity* depend upon a variety of circumstances, which cannot be reduced to any certain rule. Huberus[8] has propounded upon this question three maxims, which Mr. Justice Story, Mr.

[8] De Conflictu Legum, L. I. Tit. III. § 2.

Wheaton, and M. Fœlix equally approve, as being conformable to the practice of Nations. The first is, that the Laws of every Empire have force only within the limits of its own Government, and bind all who are subjects thereof; but not beyond those limits. The second is, that all persons who are found within the limits of a Government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rulers of every Empire from *Comity* admit that the Laws of every people in force within its own territorial limits ought to have the same force and effect everywhere, so far as they do not prejudice the power or rights of other Governments, or of their citizens. "From this," Huberus adds, "it appears that this matter is to be decided not simply by the Civil Law of a Nation, but by the reciprocal convenience and the tacit consent of different Nations; for since the laws of one people cannot have any direct operation amongst another people, so nothing could be more prejudicial to the commerce and general intercourse of Nations, than that what is legally valid in one place should become without effect by reason of the diversity of the Law in another place[9]. Certain Jurists have contended that the term *Comity* is not sufficiently expressive of the obligation of Nations to give effect to Foreign Laws, when they are not prejudicial to their own rights and interests, and have suggested that the doctrine rests on a deeper foundation; and that it is not so much a matter of Comity or Courtesy as a matter of paramount Moral Duty. "Now if it be assumed," writes Mr. Justice Story, "that such a Moral Duty exists, it is clearly

[9] Bynkershoek, De Foro Legatorum, c. 2. Martens, Précis, § 84. Klüber, Droit des Gens, § 54.

one of imperfect obligation, like that of beneficence, humanity, or charity. Every Nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded; and certainly, there can be no pretence to say that any Foreign Nation has a right to require the full recognition and execution of its own Laws in other territories, if those Laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or if their Moral character is questionable, or their provisions are impolitic or unjust[10]. Even in other cases it is difficult to perceive a clear foundation in Morals, or in Natural Law, for declaring that any Nation has a right (all others being equal in Sovereignty) to insist that its own Positive Laws should be of superior obligation in a Foreign Realm to the Domestic Laws of the latter, which may be of an equally positive character. What intrinsic right has one Nation to declare that no Contract shall be binding, which is made by any of its subjects in a Foreign Country, unless they are twenty-five years of age; any more than another Nation, where the Contract is made, has a right to declare, that such Contract should be binding, if made by any person of twenty-one years of age. One would suppose that if there be anything within the scope of National Sovereignty, it is the right of a Nation to fix what shall be the rule to govern Contracts made within its own territory[11]."

Personal, Real, and Mixed Statutes.

§ 161. A distinction has accordingly been made by the Civilians between *Personal* Statutes, *Real* Statutes, and *Mixed* Statutes. *Personal* Statutes, ac-

[10] Story's Conflict of Laws, § 33.

[11] Saul v. his Creditors, 17 Martin's Louisiana Repts. 569—598.

cording to this classification, are those portions of the Civil Law of a Nation which have persons principally for their object, and treat only of property as an accessory; such are those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract or to make a will or to sue in proper person, &c. *Real* Statutes are those which have property principally for their object, and which do not speak of persons except in subordination to property; such as those Laws which concern the disposition which may be made of property either by deed or by will. *Mixed* Statutes are those which concern at once persons and property. This threefold classification has been considered by Merlin[12] to be unnecessary, as every Statute ought to receive its denomination according to its principal object; and according as that object is real or personal, so ought the quality of the Statute to be determined. But the distribution of Statutes into three classes is usually adopted, as stated by Rodenburg[13]; because there is a corresponding difference of fact in the scope of Statutes, for a Statute either disposes respecting persons in the abstract, without any regard to things; as, for instance, at what age a person shall be a free agent (Sui juris), and cease to be subject to the parental authority, (patria potestas,) or it disposes of things without regard to persons; as, for instance, whether property of a certain quality can pass by will, or must be transmitted by deed, and in either case, with what formalities; or it enables or forbids certain persons to do certain things, as it forbids a father to alienate

[12] Merlin, Répertoire du Droit. Art. *Statut.*

[13] De Statutorum Diversitate, c. 2. p. 4.

his patrimonial estates, and permits him to dispose of property acquired during his lifetime[14].

§ 162. With regard to *Personal* Statutes, they are held to be of general obligation and force everywhere. *Real* Statutes, on the other hand, are held to have no extra-territorial force or obligation. With regard to *Mixed* Statutes, the extent and degree of their operation is one of the most intricate questions of International Jurisprudence. Thus much however may be said, that their operation is not a question of Right, but of Comity; and that the Comity of Nations extends thus far only. If, for instance, a Mixed Statute involves a question of Contract, and it is sought to enforce the Contract within the territory of an Independent Power other than that Power within whose territory the Contract has been made, it is necessary in the first place, that the subject matter of the Contract should be such as does not contravene the Law or policy of the Power, before whose tribunals it is sought to be enforced. This fact being established as a preliminary, the tribunals of the latter Power will take into consideration the *lex loci contractûs*, to determine the *constat* of the obligation, but they do not administer the Law of the place, where the Contract was entered into, in awarding the remedy. They award only that remedy which the *Lex Fori* expressly ordains, or a remedy which is in accordance with the analogy of the *Lex Fori*.

Growth of Private International Jurisprudence.

The administration of Foreign Law by Courts of Justice under the Comity of Nations has given rise to an extensive department of Juridical Science,

[14] The distribution of Statutes into three classes is also adopted by Boullenois, Traité des Statuts Réels et Personnels, L. I. c. 2. obs. 2. and by Voet, de Statutis, § 4. c. 2. See Pothier, Coutumes d'Orléans, c. 1. § 1. Art. 6, 7, 8.

which has been termed Private International Jurisprudence. This branch of Juridical Science, which is concerned more especially with the conflict of Laws arising out of the relations of civil life, which exist between the citizens of different States, proceeds upon a wise and liberal regard to the mutual convenience and mutual necessities of mankind. The real difficulty is to ascertain what principles in point of public convenience ought to regulate the conduct of Nations in these matters in regard to one another. The necessity of the general welfare has sanctioned certain exceptions to the rule, *Statuta suo clauduntur territorio, nec ultra territorium disponunt;* and the *Civil* legislation of one Nation may through the Comity of another Nation have effect given to it beyond the limits of its territory. But there is no such Comity in regard to the *Criminal* legislation of a Nation, and where the Criminal Law of one Nation has effect given to it within the territory of another Nation it is in virtue of express Conventions.

Exceptional position of Europeans whilst resident amongst Asiatics.

§ 163. Instances of such Conventions are found in the Capitulations between the Christian Powers of Europe and the Ottoman Porte; whereby magistrates nominated by various Christian Powers are respectively empowered to administer the Law of their own Nation amongst its subjects, who may be resident within the Ottoman territory. Treaties to a similar effect have been concluded by the Emperor of China with Great Britain[15], (22 July, 1843,) with the United States of North America[16], (3 July, 1844,) with France[17], (24 Oct. 1844,) and with Russia[18], (13 June, 1858,) and by the Mikado of Japan with

[15] Martens, N. R. Gén. V. p. 434.

[16] Id. VII. p. 134.

[17] Id. VII. p. 443.

[18] Id. XVI. pt. II. p. 128.

Great Britain[19], (26 August, 1858,) and with France[20], (9 Oct. 1858,) and subsequently with most of the European Nations. Such treaties, however, are in the highest degree exceptional. But the Law of European Nations has itself always been exceptional in its application to Mahommedan and other Non-Christian Nations. Amongst Christian States there are no such fundamental differences in their respective standards of Morality, as to render the Criminal Law of one State totally inapplicable to the subjects of another State; but amongst the Mahommedan and Buddhist Nations there is so essential a diversity in the sanctions, which religion and morality attach to human conduct, as contrasted with those which prevail throughout Christendom, that from the oldest time an immiscible character between Europeans and Orientals has been maintained. Europeans are not admitted into the general body and mass of the society of Asiatic Nations[21]; they continue strangers and sojourners in the land, if they reside amongst them; they form *de facto* an *extra-territorial community*, which does not acquire a National character by permanent residence amongst them. In former times when it was the custom of the Christian Powers of Europe to maintain Factories in the cities of the Levant, Europeans permanently trading under the shelter and protection of those establishments were held to take the National character of the Association, under which they lived and carried on their commerce. The modern system of exercising treaty-jurisdiction leads to the presumption, that the subjects of the Powers which are parties to those treaties,

[19] Martens, N. R. Gén. XVI. pt. II. p. 430.

[20] Ibid. p. 439.

[21] The Indian Chief, 5 Robinson's Rep., p. 29.

being exempt from the territorial Sovereignty of the State, wherein they permanently reside, will retain, notwithstanding such residence, the National character which attaches to them by their origin.

Personal Actions of Foreigners.

§ 164. In Great Britain, in the United States of North America, in the Germanic States, in Holland, foreigners equally with natives are allowed to bring personal actions against foreigners before the tribunals of the country where they may happen to reside. They cannot bring real or possessory actions, as those are within the exclusive competency of the Courts of the *loci rei sitæ*. But inasmuch as by the Law of Nations the jurisdiction of a Nation extends over all *persons and property* within its territory, with the exception of the persons and property of Sovereign Princes and their Representatives, it would seem clear upon general principles, that it is a matter of civil policy to decide, in what manner that jurisdiction should be exercised as between foreigners. In some countries, such as Spain and Portugal, there have been special tribunals constituted under treaty-engagements and charged with the jurisdiction over questions in which foreigners were concerned. The Judges of those tribunals were termed Judges-Conservators. In Portugal there was a remarkable privilege enjoyed by British subjects. The Treaty of 1654 concluded between the Republic of England and the Kingdom of Portugal provided for the appointment of a Judge-Conservator of the British Nation, whose province it was to decide all actions between British Subjects not having a Portuguese Domicil by the Law of Nations, and all actions between British and Portuguese subjects. There was an analogous Treaty of a later date between France and Portugal in regard to French Subjects. But in case

of a suit of a French Subject against a British Subject, the privilege granted to the British Nation being the most ancient, the Judge-Conservator of the British Nation was held to be the Competent Judge[22]. The institution of a special judge to administer justice between resident foreigners not domiciled in Rome, and between resident foreigners and Roman Citizens, was a peculiar feature of the early Roman Jurisprudence. The functions of the *Prætor Peregrinus* are described as being those of a Judge *qui inter cives et peregrinos jus dicebat*, and the rules of law which he administered were classed by the Roman Jurists under the head of *Jus Gentium*, or the law which Natural Reason teaches all mankind, and which is observed equally by all Nations, and under which all kinds of personal contracts are comprised[23]. France occupies a somewhat exceptional position as contrasted with the States above mentioned. Two foreigners who have entered into a contract in a foreign country are not allowed to sue each other upon the contract before a French Tribunal, unless one or other of the foreigners has acquired a French domicil before the contract was entered into[24]. The same rule prevails in Belgium and in the Kingdom of the Two Sicilies, where the Code Napoleon has been introduced. The principle of jurisprudence, upon which this practice is based, is comprised in the maxim, *Actor sequitur forum Rei*, according to which every defendant is entitled to be sued before his natural judges. The Code Napoleon interprets this maxim in such a case as referring to the

[22] Gazette des Tribunaux of 16 and 17 Oct. 1843, cited by Fœlix, Traité du Droit International, T. I. § 148.

[23] Ex hoc jure gentium et omnes paene contractus introducti sunt, ut emptio, venditio, locatio, conductio, societas, depositum, mutuum, et alii innumerabiles. Just. Inst. L. I. Tit. II. § 2.

[24] Code de Commerce, Art. 631.

Tribunals of the *domicil* of the Defendant. Vattel[25] applies this maxim in a different manner; he holds that, "disputes that may arise between foreigners or between a foreigner and a citizen are to be determined by the Judge of *the place*, and according to the laws of *the place*. And as the dispute properly arises from the refusal of the defendant, who maintains that he is not bound to perform what is required of him, it follows from the same principle, that every defendant ought to be prosecuted before his own Judge, who alone has a right to condemn him and compel him to the performance. The Swiss have wisely made this rule one of the articles of their alliance, in order to prevent the quarrels that might arise from the abuses that were formerly too frequent in relation to this subject. *The defendant's Judge* is the judge of *the place* where the defendant has his domicil, or the Judge of *the place* where the defendant happens to be when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In this latter case, as property of that kind is to be held according to the laws of the country where it is situated, and as the right of granting possession belongs to the ruler of that country, differences relating to such property cannot be decided anywhere except in the State on which it depends." M. Fœlix, in commenting on the practice of the French Tribunals, considers that the refusal of the French Tribunals to take cognisance of personal actions, in which both the Plaintiff and Defendant are foreigners temporarily resident in France, is a violation of the Law of Nations as received in Europe, and exposes French Subjects to a reciprocal disability before the tribunals of another country, wherein they may be

[25] Droit des Gens, L. II. § 103.

temporarily resident, seeing that the condition of reciprocity is presumed, whenever the Comity of Nations is invoked.

Extra-Territoriality of certain Foreign Persons and Things.

§ 165. The privilege of *Extra-Territoriality*, or immunity from the Civil Law of the Territory, is by the practice of Nations accorded to all Sovereign Princes and their attendants, who may be temporarily within the territory of an Independent Power. The same privilege is accorded to the Representatives of Foreign Sovereigns, who may be permanently resident under the title of Ambassadors or Envoys at the Court of an Independent Power. By the established practice of Nations the House of Residence of an Ambassador or Envoy is held to be subject to the civil and criminal jurisdiction of the Sovereign whom he represents, to the exclusion of the jurisdiction of the Sovereign to whom he is accredited, and within whose territory he resides. All persons attached to the person of the Ambassador and all his moveable effects partake in this immunity. In a similar manner, if an Independent Power permit the armed forces of another Nation to pass through its territory, this permission implies a waiver on its part of all jurisdiction over the troops during their passage through its territory, and a license to the commander to maintain that discipline, and to inflict those punishments, which the government of his troops may require. On the other hand, if an armed force should enter by land the territory of an Independent Power without its permission, such Power is entitled to exercise its absolute territorial jurisdiction over them, and if it thinks fit, to disarm them. The rule, however, which applies in relation to an armed force upon land, does not apply equally to an armed force upon the sea, as by the usage of Nations ships of war may freely enter the ports of a friendly Power without express

permission, unless there be an especial prohibition against vessels of war entering such ports. It is competent for every Nation for reasons of State Policy to close all its ports, or certain only of its ports, against the vessels of war of all Nations or against the vessels of war of a particular Nation, but in such cases notice is usually given of such determination. If there be no such prohibition, the ports of a Friendly Nation are considered to be open to the public ships of all Powers, with which it is at peace, for purposes of hospitality, and they are supposed to enter such ports under an implied license from the Sovereign Power of the place. This implied license in the case of a public ship is by practice construed to carry with it a total exemption from the law of the territory. A public vessel of war represents the Sovereign Power of the Nation, under whose commission and flag it sails. If it leaves the High Seas, the common highway of Nations, and enters within the maritime territory of a Friendly State, it is entitled to the same privileges which would be extended to the person of the Sovereign [26]. A ship of war has been termed an extension of the territory of the Nation to which it belongs, not only when it is on the wide ocean, but when it is in a foreign port. In this respect a ship of war resembles an army marching by consent through a neutral territory. Neither ships of war nor army so licensed fall under the jurisdiction of a Foreign State [27].

Merchant Vessels are subject to the Territorial Law.

§ 166. Private vessels, on the other hand, enter the ports of a foreign Nation for the purposes of trade, under the implied protection of the Sovereign of the place, but subject at the same time to the Law of the

[26] Lord Chief-Justice Marshall's Judgment in The Schooner Exchange v. McFaddon, 7 Cranch's American Repts. p. 116.

[27] Dr. Channing on the Duty of Free States.

Territory. So complete is the authority of the *lex loci* over all persons and property on board of private vessels, that if a vessel under the British Mercantile Flag, whilst slavery was a social institution of the Southern States of North America, entered the port of Charleston, having free negro sailors amongst her crew, the mercantile flag did not protect those sailors from the operation of the territorial Law of the state of South Carolina, which forbade a free negro to be at large within the limits of that State. It thus frequently happened that negroes, or persons of colour, though free subjects of her Britannic Majesty, and duly entered on the muster roll of the Crew of a British merchant vessel, on such vessel entering the port of Charleston, were taken out of her by the officers of the Port under the authority of the local law, and were detained in custody until the vessel cleared outwards, when they were again placed on board of the ship with permission to leave the country. On the other hand, if a merchant ship under a foreign flag were to enter a British Port with one or more negro slaves on board, her mercantile flag would not avail to exclude the jurisdiction of the British Courts, if their territorial authority should be invoked to vindicate the personal liberty of an human being who is within British Territory [28]. It follows, that the crew of a merchant vessel, which is within the port of a foreign Nation, are amenable to the territorial Law of that Nation in respect of all offences against that Law committed within the port, whether those offences be committed on board the merchant vessel or on shore. But if an assault be committed

[28] It was decided in the memorable case of Somerset the Black, by a Judgment of the Court of King's Bench, June 22, 1772, that a State of Slavery cannot exist in Great Britain.

on board a merchant vessel whilst she is on the High Seas, such an offence is only cognisable by the courts of the country to which she belongs; no one on board of her may be impleaded for such offence before the courts of a foreign country, although the vessel may enter its ports immediately after the offence has been committed. The crime of piracy, of course, is an exception to this rule, being an offence under the Law of Nations, which may be punished even on the High Seas by the first comer, and which crime every sovereign Power has a concurrent jurisdiction to suppress.

Right of Emigration.

§ 167. Considered from an international point of view, the jurisdiction of a Nation must be founded either upon the fact that the person or the property is within its territory. Considered from a civil point of view, jurisdiction may be founded upon *natural* as well as *local* allegiance; in other words every independent State claims to make laws perpetually binding upon its natural born subjects, wherever they may be. But natural allegiance, or the obligation of perpetual obedience to the government of the country, wherein a man may happen to have been born, which he cannot forfeit, or cancel, or vary by any change of time, or place, or circumstance, is the creature of Civil Law, and finds no countenance in the Law of Nations, as it is in direct conflict with the incontestable rule of that Law; "Extra territorium jus dicenti impune non paretur[29]."

Vattel, accordingly, holds that a citizen has an absolute right to renounce his country and abandon it entirely—a right founded on reasons derived from the very nature of political society. For instance, if the citizen cannot procure sustenance in his own country,

[29] Dig. L. II. Tit. 1. § 20. Pothier, Pandect. L. I. T. 1. n. 7.

it is undoubtedly lawful for him to seek it elsewhere. If the society of which he is a member fails to discharge its obligations towards a citizen, he may withdraw himself. If the major part of a Nation, or the Sovereign who represents it, attempts to enact laws relative to matters in which the Social Compact cannot oblige every citizen to submission, as for instance in the affairs of Religion, those who are averse to such laws have a right to quit the Society and settle themselves elsewhere. Citizens, who under such circumstances abandon their native country *sine animo revertendi*, and settle themselves elsewhere, are called *Emigrants*, and the Law of Nations recognises in such persons a capacity to acquire the National character of the country of their adoption.

Domicil, the criterion of National character.

§ 168. According to the Law of Nations, when the National character of a person is to be ascertained, the first question is, in what territory does he reside, and is he resident in that territory for temporary purposes, or permanently. If he resides in a given territory permanently, he is regarded as adhering to the Nation to which the territory belongs, and to be a member of the political body settled therein. If he is only resident in a given territory for temporary purposes, he is regarded as a stranger thereto, and a further question must then be asked, in what country is his principal establishment, and where, when he has returned, does he consider himself to be at home[30]. The country, which satisfies the conditions implied in this further question, is designated in the language of

[30] In eo loco singulos habere domicilium non ambigitur, ubi quis larem, rerumque et fortunarum suarum summam constituit, unde non sit discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit. Codex, L. X. Tit. XXXIX. § 7.

public Law the *Domicil* of the individual, which Vattel[31] defines as a fixed residence in any place with the intention of always remaining there. Wolff has, in a similar manner, defined *domicilium* to be "habitatio aliquo in loco constituta, perpetuo ibidem manendi animo[32]." The word *Domicil* is originally a term of Roman Municipal Law, the Romans using the expression to denote the place in which a Roman citizen had to discharge his municipal obligations, in distinction from the place in which he was born; and in this sense it is employed by Grotius[33], as illustrating the privilege which Roman citizens enjoyed under the later Imperial Constitutions, of transferring their permanent abode from one *Municipium* to another. The distinction between the *civis* and the *incola* was founded thereupon. "Cives quidem origo, manumissio, allectio, vel adoptio, incolas vero domicilium facit[34]," and jurisdiction was made in many cases to depend upon the place of residence of the individual, as distinguished from the place of his birth. The question of Domicil lost its importance after the conquest of the Roman Empire by the Barbarians, as for a long time a system of *personal* laws prevailed amongst the communities of mixed races, the Lombard living under the Lombardic, and the Roman under the Roman Law[35]; but after the Peace of Westphalia, from which event we may date the commencement of *normal intercourse* between European Nations[36], the subject of Domicil came to be again discussed by Jurists under new circum-

[31] Droit des Gens, L. I. § 217.
[32] Jus Gentium, § 137.
[33] De Jure Belli et Pacis, L. II. c. V. § 24.
[34] Codex, L. X. Tit. 29. § 7.
[35] Savigny, Geschichte des Römischen Rechts im Mittelalter, c. III. § 30.—Story's Conflict of Laws, § 2.
[36] The establishment of permanent Embassies at Foreign Courts dates from this period.

stances, namely, with reference to the residence of individuals in different Territories, and not as in the Roman system of Law, with reference to their residence in different places within the same Territory, namely, the Roman Empire. Sir Robert Phillimore, in his Treatise on Domicil [37], has observed that "as the subjects of one kingdom began to migrate into and reside in other countries, the various questions, arising from a conflict between the municipal regulations of the original and the adopted country, gave importance to the Law of Domicil, and rendered the maintaining an uniformity of rules respecting it in Christendom a matter of great consequence. Lord Campbell, to the same effect, in a recent judgment of the House of Lords, overruling the Scotch Courts of Exchequer, has taken occasion to remark, that "the doctrine of Domicil has sprung up in Great Britain very recently, and that neither the Legislature nor the Judges thought much of it, but it is a very convenient doctrine, it is now well understood, and it solves the difficulty with which this case was surrounded [38]." Sir Robert Phillimore has further remarked most aptly, that the circumstance which has most contributed to give importance to the Law of Domicil, has been the universally increasing value of *personal property.*

Jurisdiction and Remedies.

§ 169. Jurists have laid it down that there are, properly speaking, three places of jurisdiction; first, the domicil of the defendant, commonly called *forum domicilii:* "Nam ubi domicilium reus habet, vel tempore contractûs habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet [39];" secondly, the

[37] The Law of Domicil, § 8.

[38] Thompson v. Advocate General, 12 Clark and Finelly's (House of Lords) Reports, p. 1.

[39] Codex, Lib. III. Tit. XIII. § 2.

place where the thing in controversy is situated, commonly called *forum rei sitæ:* "Sed et in locis, in quibus res, propter quas contenditur, constitutæ sunt, jubemus in rem actionem adversus possidentem moveri[40];" and thirdly, the place where the contract is made or other acts done, commonly called *forum rei gestæ* or *forum contractûs*[41]: "Illud secundum est, eum, qui ita fuit obligatus, ut in Italia solveret, si in provincia habuit domicilium, utrobique posse conveniri, et hic et ibi[42]." These distinctions constitute the basis of the reasoning of most Jurists in discussing the competency of tribunals to hold jurisdiction of causes and the proper operation of Judgments and Decrees (rei judicatæ); as for instance, whether they are final and preclude any further proceeding on the same cause of action before the Tribunals of another country. Some countries, such as France, repudiate all obligation on the part of their Tribunals to administer the law of the *forum contractûs.* Other countries, such as Great Britain and the United States of America, administer the law of the *forum contractûs* in this manner: "What the nature of the obligation is must be determined by the laws of the country where it was entered into, and then this country will apply its own law to enforce it[43]." "We all agree that in construing contracts we must be governed by the laws of the country where they are made, for all contracts have reference to such laws. But when we come to remedies, it is another thing. They must be pursued by the means which the law points out, where the parties reside. The laws of the

[40] Codex, Lib. III. Tit. XIX. § 3.

[41] Huberus, Lib. V. Tit. I. Boullenois, Obs. § 25.

[42] Dig. L. V. Tit. I. s. 19. § 4.

[43] Lord Chief Justice Eyre in Melan v. Fitzjames, 1 Bos. and Puller, 138.

country where the contract was made can only have reference to the nature of the contract; not to the mode of enforcing it. Whoever comes voluntarily into a country subjects himself to the laws of that country, and therein to all remedies directed by those laws on his particular engagements [44]." It is immaterial whether the remedies given by the law of a foreign country, to the tribunals of which country the complaint is made, exceed or fall short of those given by the law of the place of contract; in either case the parties to a suit must accept the remedy of the Forum, to which they have appealed. Lord Tenterden in a more recent case has said, "A person suing in this country must take the law as he finds it. He cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this country are entitled to [45]." A similar doctrine has been solemnly promulgated in the House of Lords on a still more recent occasion [46].

Comity of Nations in regard to personal property.

§ 170. The rightful exercise of jurisdiction on the part of a Nation depends upon one or other of these conditions, that the person or the property is within the territory of the Nation. In either of these cases a Nation is capable of enforcing the judgment of its tribunals *in invitos*. If the persons are within its territory, the Sovereign Power of the Nation can compel them to appear before its tribunals, and can enforce its decisions *in personam*. If the property is within its territory, the Sovereign Power of the

[44] Mr. Justice Heath in Ogden v. Saunders, 12 Wheaton, p. 213.

[45] De la Vega v. Viana, 1 Barn. and Adolph. 284.

[46] Don. v. Lipmann, 5 Clark and Finelly, 1, 13, 14.

Nation has control over it, and can enforce its judgments *in rem.* But the exercise of the strict Right of Nations has been tempered by the Comity of Nations with respect to *persons,* and with respect to *personal* as distinguished from *real* property, and in practice the Civil Law of a Nation has exclusive operation given to it only with respect to persons domiciled within its territory, and with respect to real property which is there situate. The maxim *mobilia sequuntur personam* is interpreted to signify that moveables are, in law, attached to the person of the owner, although they may in fact be apart from it. The incidents of Moveable property are accordingly regulated by the same law as the person of the owner, that is by the law of his Domicil. "Les meubles," says Cochin, "quelque sorte qu'ils soient, suivent le Domicile [47]." Personal property having no *Situs* of its own, follows the domicil of its owner [48]. Mr. Justice Story, in his Conflict of Laws, has discussed at great length the reasoning of various Jurists as to the grounds upon which this doctrine proceeds, but their arguments all lead to the same result, and whatever may have been the true origin of the doctrine, it has now received so general a sanction amongst civilized nations, that it may be treated as part of the Jus Gentium. The grounds upon which the English Tribunals have received the doctrine are stated by Lord Loughborough: "It is," he says, "a clear proposition not only of the Law of England, but of every country in the world, where Law has the semblance of a Science, that personal property has no locality. The meaning of this is, not that personal

[47] Cochin, Œuvres, Tom. V. p. 85.

[48] Thomson v. The Advocate General, 12 Clark and Finelly, (House of Lords) Repts. p. 1.

property has no visible locality, but that it is subject to that law which governs the person of its owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person[49]." Lord Chief Justice Abbot has observed on a more recent occasion, that "personal property has no locality, and even with respect to that, it is not correct to say that the Law of England gives way to the law of the foreign country, but that it is part of the Law of England that personal property should be distributed according to the Jus Domicilii[50]."

Domicil of Origin and Domicil of Choice.

§ 171. The Domicil of a person for international purposes may be either his Domicil of origin, or his Domicil of choice. The Domicil of origin of a person is identical with the Domicil of his father at the time of his birth. "Patris originem unusquisque sequatur[51]." If his parents at the time of his birth should be on a temporary visit to a foreign country, the home of the parents, and not the country of his birth, is the Domicil of origin of the child[52]. The Domicil of origin is thus not necessarily identical with the place of birth. The place of birth, on the other hand, may constitute a person a natural born subject of one Sovereign for municipal purposes, whilst he is a domiciled subject of another sovereign for international purposes. The Domicil of origin cannot be divested during minority by a change of residence on the part of the minor with the intention of making his new residence his home, but it may be divested by the act of his father. If the father changes his

[49] Still v. Worswick, 1 Henry Blackstone's Repts. 690.

[50] Doe d. Birthwhistle v. Vardill, 5 Barn. and Cresswell, 438, 451, S. C. 2 Clark and Fin. 571.

[51] Codex, Lib. X. Tit. XXXI. § 36.

[52] Wolffii Jus Gentium, § 138.

residence and acquires a new Domicil, it becomes the Domicil of his minor children, and if the father dies leaving minor children surviving him, the father's Domicil of choice at the time of his death is the necessary Domicil of his children until they come of age, and are capable of acquiring a Domicil of choice. Every person of full age is capable of selecting a Domicil; and if such a person removes from the country, where his father had his Domicil, to a foreign country with the settled purpose of making it his permanent residence, the country of his adoption becomes his domicil of choice. Domicil being thus under the Law of Nations the foundation of jurisdiction over persons, it is intelligible on general principles that the residence of Ambassadors and Political Envoys in a foreign country, even if such residence continue up to the time of their death, being a residence "sine animo manendi," should not operate to change their Domicil, such as it was at the time when they became resident in the foreign country; their extra-territoriality besides secures to them an "immiscibility" of national character. A different rule however prevails with respect to Consuls or Commercial Agents, who, if permanently engaged in commerce themselves, may acquire a Domicil in the country where they reside. It is sometimes a question of great intricacy to determine in what place a person has his legal Domicil. No person according to the Law of Nations is without a Domicil. In the absence of all evidence of any other Domicil *de facto*, the Domicil of Origin is the Domicil *de jure*[53], but a per-

[53] Quoniam tamen domicilium naturale tamdiu quis retinere censetur, quamdiu propria voluntate sibi nullum constituit, vagabundi quoque domicilium naturale vulgo retinere censentur. Wolff. Jus Gentium, § 139.

son may have more than one Domicil for commercial purposes; as for instance, a person may be a partner in a great commercial establishment in New York, and in another equally great commercial establishment in Liverpool[54]; and in respect of contracts he may be subject to two different jurisdictions according as the contract is entered into by the New York establishment, or by the Liverpool establishment; but no person can have more than one testamentary Domicil, as the latter is identical with the place of the party's principal establishment. To enter more minutely into the *criteria* of Domicil would be foreign from the purpose of the present treatise, which is concerned with Domicil only so far as the principle of Domicil influences the Jurisprudence of Nations, in reference to persons and personal property. Mr. Justice Story's excellent work on the Conflict of Laws and M. Fœlix's treatise on Private International Law may be consulted with advantage by those, who desire to become more accurately acquainted with the details of this branch of the Law of Nations.

[54] Labeo judicat eum, qui pluribus locis ex æquo negotietur, nusquam domicilium habere; quosdam autem dicere refert, pluribus locis eum incolam esse, aut domicilium habere; quod verius est. Dig. L. Tit. I. § 5. The San José Indiano and Cargo, 2 Gallison's American Reports, p. 287. The Portland, 3 Robinson, p. 41. The Jonge Classina, 5 Robinson, p. 502.

CHAPTER XI.

RIGHT OF THE SEA.

The use of the open Sea common to all mankind—A Common Law of the Sea—Affinity to the Roman Law in certain matters—Origin of the Admiralty Jurisdiction—Its connection with that of the Consules Maris—Piracy justiciable everywhere—Concurrency of Admiralty with National Jurisdiction—National Jurisdiction over the open Sea—Maritime Jurisdiction of a Nation—Territorial Seas distinguished from Jurisdictional Waters—Prescriptive Right over portions of the Sea—Narrow Straits—Right of Fishery on the High Seas—Neutrality of Jurisdictional Waters—Right of Maritime Toll in respect of Lighthouses and Sea-Marks—Prescriptive Right of Sea-Toll—The Sound Dues—The Straits between the Mediterranean and the Black Sea—The Comity of Nations in matters of Revenue and Quarantine—Right of Fishery in Jurisdictional Waters—Convention of 2 August, 1839, between Great Britain and France—Agreement of 1874 between the British and German Governments—Ceremonial of the High Seas—Ceremonial within Jurisdictional Waters—Origin of the Mercantile and of the Military flag of the Sea—Certain States entitled only to a mercantile flag—Project of a Swiss mercantile flag of the Sea—The Jerusalem or Terra Santa flag.

The use of the open Sea common to all mankind.

§ 172. THE Ocean or open Sea is by Nature not capable of being reduced into the Possession of a Nation, since no permanent settlement can be formed upon its ever changing surface; neither is it capable of being brought under the Empire of a Nation, as no armed fleet can effectively occupy it in its full extent, so as to preclude other Nations altogether from the use of it. Nature herself has in these respects set limits to human enterprise and human ambition. But independently of these insurmountable difficulties, the use of the open Sea, which consists in navigation, is innocent and inexhaustible; he who navigates

upon it does no harm to any one, and the Sea in this respect is sufficient for all mankind. «But Nature does not give to man *a right to appropriate* to himself things which may be innocently used by all, and which are inexhaustible and sufficient for all. For since those things, whilst common to all, are sufficient to supply the wants of each, whoever should attempt to render himself sole proprietor of them, (to the exclusion of all other participants,) would unreasonably wrest the bounteous gifts of nature from the parties excluded.» Further, if the free and common use of a thing, which is incapable of being appropriated, were likely to be prejudicial or dangerous to a Nation, the care of its own safety would authorise it to reduce that thing *under its exclusive Empire*, if possible, in order to restrict the use of it on the part of others, by such precautions as prudence might dictate. But this is not the case with the open Sea, upon which all persons may navigate without the least prejudice to any Nation whatever, and without exposing any Nation thereby to danger. It would thus seem that there is no Natural warrant for any Nation to seek to take possession of the open Sea, or even to restrict the innocent use of it by other Nations[1].

A Common Law of the Sea.

§ 173. The open Sea is, strictly speaking, *nullius territorium*. No Nation can claim to exercise jurisdiction over its waters on any ground of exclusive Possession. On the other hand, it is the public highway of Nations, upon which the vessels of all Nations meet on terms of equality, each vessel carrying with it the laws of its own Nation for the government of those on board of it in their mutual relations with

[1] Vattel, Lib. I. c. 23. § 279. Grotius, Lib. I. c. 2. § 3. Wolffii Jus Gentium, § 127. Kluber, § 132.

one another, but all subject to a Common Law of Nations in matters of mutual relation between the vessels themselves and their crews. The origin of this Common Law of the Sea is lost in the darkness of a very remote antiquity, but it sprang into existence with the earliest necessities of maritime commerce. We find the rudiments of such a law amongst the Athenians; and the Rhodian Laws of the Sea, of which a very few fragments have been preserved in the Digest[2], are supposed to have been a collection of Maritime Customs observed amongst the Nations established on the shores of the Mediterranean[3], and which formed at such time their Common Law on Maritime matters. Rules of Law which prevailed amongst those Nations are still recognised by the Maritime tribunals of existing European Nations, as rules for the decision of analogous questions.

Affinity to the Roman Law in certain matters.

§ 174. It would appear, that the Romans under the Empire with their usual wisdom recognised the Customs of the Sea, as furnishing the rule of decision in Maritime questions, where such Customs were not contrary to any positive Law of the Empire. Thus when Eudæmon of Nicomedia appealed to the Emperor Antonine against the rapacity of the Publicans in the islands of the Cyclades, on the occasion of his having suffered shipwreck, the Emperor is represented to have replied[4], "Ego quidem mundi dominus, Lex autem maris. Lege id Rhodia, quæ de rebus nauticis præscripta est, judicetur, quatenus nulli nostrarum legum adversatur. Hoc idem Divus Augustus judicavit." Bynkershoek[5], in discussing this passage of the Digest, has not approved the usual punctuation,

[2] Dig. L. XIV. Tit. II.
[3] Peckii Comment. ad legem Rhodiam de jactu.
[4] Dig. L. XIV. Tit. II. § 9.
[5] De lege Rhodia, c. 7.

nor admitted the received interpretation of the text, and has suggested that the words of the Emperor Antonine point only to a privilege which the Rhodians themselves enjoyed of living under their own laws, as long as they were not inconsistent with the Positive Law of the Empire. It is not very material for our present purpose to determine, which is the more correct construction of the passage in the Digest. On a careful examination of the legislation of the Roman Emperors, so little will be found of positive enactment in Maritime matters, that we are led irresistibly to the conclusion, that there must have been a Consuetudinary Law, according to which questions of Maritime Contract and Tort were settled; and the probability is, that the principles involved in that Consuetudinary Law were in harmony with principles that were admitted in the Civil Law of Rome. At all events we find in portions of the Consuetudinary Law of the Sea, as it has come down to us in various collections of Sea-Customs, e.g. [6] the Rooles or Jugemens d'Oleron, the Consolato del Mare, and the Maritime Law (Wâter-Recht) of Wisby, many features of resemblance to provisions which exist in the Civil Law of Rome, not indeed *in pari materiâ*, but on subjects of which the analogy is complete. It is possible that these Rules of the Sea may be actual traditions of the Civil Law itself, which, recommended by its natural equity, may have infiltered itself imperceptibly into Maritime causes. Whatever may be the true explanation of this resemblance, these Customs of the Sea have been received by all Nations, and all Nations exercise a concurrent jurisdiction to enforce them, and for this purpose there are special

[6] Pardessus, Collection de Lois Maritimes antérieures au XVIII Siècle. Paris, 1834.

tribunals established in every country, known as Courts of Admiralty Jurisdiction.

Origin of the Admiralty Jurisdiction.

§ 175. The origin of the term *Admiral* or *Amiral* is not agreed upon amongst learned men. Some have inclined to derive it from the Saxon *aen mere eal*[7], that is, over all the sea, others from the Asiatic *Amir*, or *Emir*, signifying Præfect. It seems more probable that the term came first into use amongst the Maritime Nations of Southern Europe, and that it was derived from an Oriental Source. Sir H. Spelman is of opinion, that this high Officer was not known in England by that name or style before the beginning of the reign of King Edward I, about the year 1272, although the office of *Capitaneus maris* existed before that time. The earliest Admiral of all France seems to have been *Enguarantus Dominus de Causy* in the reign of Philip the Bold, about 1280[8]. The collection of Castilian Laws, known as *Las Siete Partidas*, and the origin of which is referred to a date as far remote as 1258 or 1266, contains a full definition of the Office of Admiral. "On appelle Amiral, le chef de tous ceux qui composent l'équipage des navires armés en guerre, et il a sur la flotte qui est comme le corps d'armée principal, ou sur une escadre qui sera détachée, le même pouvoir que le roi lui-même, s'il était en personne[9]." Such seems to have been a brief summary of the functions of the Admiral of the King of Castile and Leon. On the other hand, it would appear from a collection of Maritime Laws of Catalonia and Aragon of the Fourteenth Century[10] that the word "Amiral" in its simplest sea-meaning was used to

[7] Godolphin, a View of the Admiralty Jurisdiction, anno 1661, p. 3.

[8] Godolphin on the Admiralty Jurisdiction, p. 21.

[9] Part II. Lib. IV. Tit. 34. Lex 3.

[10] Pardessus, Lois Maritimes, Tom. V. p. 404.

denote the chief of any Maritime expedition, even if the expedition consisted of a single ship. It is not improbable that an extraordinary increase of piracy in the latter part of the Thirteenth Century led to a more careful administration of the Laws of the Sea in England, in France, and in Denmark, after the example perhaps of Castile, and that the jurisdiction and cognisance of all matters whatever happening upon the Sea, by reason whereof there should be cause of suit either between subjects and strangers or between strangers only, was with that object vested exclusively in a High Admiral with the full powers of the Lieutenant of the King.

Its Connection with that of the Consules Maris.

§ 176. Whatever may have been the origin of the institution of Courts of Admiralty, the forms of their proceedings were undoubtedly borrowed from the Civil Law of Rome, and the rules by which they were governed were, as is everywhere avowed, the ancient Laws, Customs, and Usages of the Seas. There can scarcely be a doubt that the Admiralty Courts of England and the Maritime Courts of all the other Powers of Europe have been formed upon one and the same common model, and that their jurisdiction, if not restricted by the territorial law, included all those subjects of which the Consular Courts (*Consules Maris*)[11] in the cities of the Mediterranean had cognisance, and with which subjects the Municipal judges in those cities were forbidden to intermeddle. These Courts are described in the *Consolato del Mare* as having jurisdiction of all controversies respecting freights; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and neces-

[11] De Lovio v. Boit. 2 Gallison's Reports, p. 400.

sities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high sea or on shore; of the armament or equipment of ships, galleys, or other vessels, and generally of all other contracts declared in the Customs of the sea[11]. It is not within the scope of the present work to enter further into the details of the Admiralty Jurisdiction. But it may be observed that there is a Maritime Law of Nations in time of war, as well as in time of peace. The Admiralty Court exercises a *voluntary jurisdiction* in time of Peace *ad instantiam partis*, and is in such matters termed an Instance Court, whilst in time of War it exercises a *compulsory jurisdiction* over all the commissioned vessels of the Crown, which are required to bring their captures before it, in order that the Admiral or his Lieutenant may determine whether such captures are good prize of war or not. The Admiralty Court is for such purposes termed a Court of Prize, and its functions are not merely to administer the Law of Nations as between the belligerents, but the Law of Nations as between the belligerents and neutrals.

Piracy justiciable everywhere.

§ 177. The High Seas are said in a certain sense to be *nullius territorium*, as not being subject to the exclusive Possession or Empire of any Nation. In another sense they may be called the *common highway* of Nations, and perhaps this is the more correct expression, seeing that all who navigate them are subject to a Common Law of Nations, and, in matters within the scope of that Law, are amenable to the maritime tribunals of all Nations. The maintenance of the peace of the Sea is one of the objects of that Common Law, and all offences against the peace of

[11] Consolato del Mare, ch. 22. Godolphin, Adm. Jur. p. 45.

the Sea are offences against the Law of Nations, and of which all Nations may take cognisance. The robber equally with the murderer on the High Seas is technically a sea-felon or pirate, and every hand may be lawfully raised against him; he is, in fact, regarded as an enemy of the human race (hostis humani generis). The Pirate has no National character, and to whatever country he may have originally belonged, he is *justiciable* everywhere, being reputed out of the protection of all laws and privileges whatever[12].

Concurrency of Admiralty with National Jurisdiction.

§ 178. There are however portions of the sea, upon which if offences be committed, they are not merely regarded as offences against the Peace of the Sea, but offences against the Peace of a Nation. Thus although the jurisdiction of the Admiralty travels everywhere with the flow of the tide, yet when the Sea approaches the territory of a Nation or passes within the headlands of its coast, an offence committed upon tidal waters may become an offence not merely against the Peace of the Sea, but against the Peace of the Nation, and accordingly will be cognisable by the Civil Courts of the Nation as well as by the Admiralty Court. By practice, indeed, the Admiralty Jurisdiction over tidal rivers is restricted to such portions of them as are below the first bridges[13] (*infra primos pontes*) seawards. Above the first bridges, which are effective impediments to free passage to or from the sea, the Civil Law of the Nation is of exclusive force: below that point, until we reach the *High Seas*, the Civil Law of the Nation operates concurrently with the Maritime Law of Nations.

[12] Life of Sir Leoline Jenkins, Tom. II. p. 714.

[13] Spelman's Reliquiæ. Godolphin, Adm. Jurisd. p. 134. cf. 15. Rich. II. c. 3.

National jurisdiction over the open Sea.

§ 179. It becomes necessary therefore to inquire what portion of the open Sea is by the practice of Nations held to be within the operation of the Territorial Law of a Nation. "It is of considerable importance," writes Vattel[13], "to the safety and welfare of States, that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of trading Nations, and molest their navigation." Upon this principle a Neutral Nation is held to be entitled to preclude Belligerent Powers from carrying on mutual hostilities upon the open sea within a certain distance of its coast. That distance, as between Nation and Nation, is held to extend as far as the safety of a Nation renders it necessary, and its power is adequate to assert it; and as that distance cannot, with convenience to other Nations, be a variable distance, depending on the presence or absence of an armed fleet, it is by practice since the introduction of firearms identified with that distance, over which a Nation can command obedience to its Empire by the fire of its cannon[14]. That distance, by consent, is now taken to be a Maritime League seawards along all the coasts of a Nation. Beyond the distance of a sea-league from its coasts, the Territorial Laws of a Nation are, strictly speaking, not operative. It may happen that a Nation chooses to extend its own Laws over its National vessels wherever they may be navigated on the High Seas, but however general and comprehensive the phrases used in the Municipal Law may be, they must be always restricted in their construction to the citizens of the State, to which the vessel belongs[15], and to the mutual relations between

[13] Droit des Gens, L. I. § 288. [14] Bynkershoek, L. II. c. 3. § 13.
[15] The Apollo, 9 Wheaton's Reports, § 370.

such citizens, and cannot be extended to the vessels of other Nations, or to the persons on board of them.

Maritime jurisdiction of a Nation.

§ 180. Writers on Public[16] Law have spoken of the open sea (mare vastum) within the distance of a Maritime League along the coasts of a Nation as its *Maritime Territory* (See-Gebiet). If the Law of Nations be held to be a portion of the Law of each Nation in such matters as are within its scope, then there may be no valid objection to the use of the phrase *Maritime Territory* in the sense of Territory subject to the Law of the Sea, but inasmuch as the term *territory* in its proper sense is used to denote a district within which a Nation has *an absolute and exclusive right to set Law*, some risk of confusion may ensue if we speak of any part of the open Sea over which a Nation has only a *concurrent right to set Law*, as its *Maritime Territory*. It would tend to greater clearness, if Jurists were to confine the use of the term *Maritime Territory* to the actual coasts of a Nation, or to those portions of sea *intra fauces terræ* over which a Nation is entitled to *exclusive jurisdiction*, and over which its Territorial Law has paramount force and operation, and if they were to designate the extent of tidal waters, over which the Territorial Law of a Nation operates *concurrently* with the Law of Nations, as its *Jurisdictional Waters*[17].

Territorial Seas distinguished from Jurisdictional waters.

§ 181. If a sea is entirely enclosed by the Territory of a Nation, and has no other communication with the Ocean than by a channel, of which that Nation may take possession, it appears that such a sea is no less capable of being occupied and becoming property than the land, and it ought to follow the fate of the

[16] Klüber, § 130. Wheaton's Elements, pt. 4. c. 4. § 6.

[17] Mr. Justice Story has adopted this expression in his judgment in the Schooner Fame, 3 Mason's American Reports, p. 152.

country that surrounds it[18]. The Black Sea, whilst its shores were in the exclusive possession of the Ottoman Porte, was an instance of a Territorial Sea of this character. So likewise Straits, which serve as a communication between two seas, and of which the shores on both sides are the Territory of one and the same Nation, are capable of being reduced into the possession of that Nation. In the same manner a bay of the Sea, the shores of which are the Territory of one and the same Nation, and of which the entrance may be effectively defended against all other Nations, is capable of being reduced into the possession of a Nation. "By this instance," writes Grotius[19], "it seems to appear that the property and dominion of the Sea might belong to him who is in possession of the lands on both sides, though it be open above as a gulf, or above and below as a strait, provided it be not so great a part of the Sea, as when compared with the lands on both sides, it cannot be supposed to be a portion of them."

Puffendorf[20], to the same effect, says, "that gulfs and channels or arms of the Sea are, according to the regular course, supposed to belong to the people with whose lands they are encompassed." Whenever a Nation has an exclusive right over an entire sea, or over a bay, no other Nation can claim a right of navigation therein against its will. But in case the opposite sides of a bay are inhabited by different Nations, then under the general Law of Nations, each Nation has a right to go to the central line, drawn at low water mark, as marking the extent of its jurisdictional waters[21]. But although the terri-

[18] Vattel, L. I. § 292. Wolff, § 128.

[19] De Jure Belli et Pacis, L. II. c. 3. § 8.

[20] Law of Nature and of Nations, L. IV. c. 5. § 8.

[21] Ibid.

torial limit of either Nation for purposes of absolute jurisdiction may not extend beyond the central deep-water line, yet the right of *innocent use* of the entire bay for the purposes of navigation or passage may be common to both Nations. Such a right does not destroy the territorial jurisdiction of each Nation as far as the middle of the water (medium filum aquæ), but it is in the nature of an *easement*, as it is called in English Law, or a *servitude*, as it is termed in the Roman Law[22]. It is in fact analogous to the right of *private way* over the land of another. This right of passage and navigation must exist as a common right in all those cases, where such passage or navigation is ordinarily used by both Nations, and is indispensable for their common access to their own shores. A bay may be so narrow, or so irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be effectively navigated by either Nation, without each having a right of passing over any portion of the water at any time. If in such a case no exclusive right is recognised in either Nation, the constant use by both is a conclusive proof of both having a common right of passage and navigation.

Prescriptive right over portions of the Sea.

§ 182. In the case of portions of the Sea, a Nation may have a peculiar possession of them, so as to exclude the universal or common use of them by other Nations[23]. Lord Stowell held that portions of the Sea might be prescribed for[24]; and Mr. Justice Story deemed it possible that a Nation might have an exclusive use founded on the acquiescence or tacit

[22] Instit. II. Tit. 3. De Servitutibus. Hugo, Histoire de Droit Romain, T. I. § 202. Klüber, § 137.

[23] Klüber, § 133.

[24] The Schooner Fame, 3 Mason's Repts., p. 150. The Twee Gebroeders, 3 Rob. p. 339.

consent of other Nations. There is no inconsistency between these views and those of Grotius, who says, "that he who has occupied any part of the Sea cannot lawfully hinder the navigating therein of ships that are unarmed, and give no room to apprehend danger;" for Grotius must be understood as speaking of the *natural* right of a Nation, and not of an *instituted* right founded on the tacit consent of other Nations[24]. Lord Stowell[25] has observed that the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence; in other words, by proof of ancient and constant usage.

Narrow Straits.

§ 183. The difficulty in respect of narrow straits connecting portions of the open Sea and separating independent States, where the Straits are not of sufficient width to allow to each State a margin of jurisdictional waters to the extent of three miles from its coast, is solved by applying to them the same principle of law, which is applied to determine the extent of the jurisdiction of Riparian States over a river, which separates them, namely, that the Empire of each State extends to the mid-channel. The rule is thus expressed by Puffendorf[26]: "But in case different nations border on the same channel, the sovereignty of each shall be conceived to reach unto the middle of the water from every part of their respective shores, unless either all the States have agreed by

[24] Puffendorf, L. IV. c. 5. § 8.

[25] The Twee Gebroeders, 3 Rob. p. 339.

[26] Book IV. ch. v. § 8, Basil Kennett's translation, London, 1728.

covenant to use the whole water promiscuously amongst themselves, and to exercise a general undivided sovereignty over it against Foreigners, or else if one particular people has obtained a dominion over the whole by pact, or by the tacit concession of the rest, or by right of conquest, or because they first fixed their station near it, and immediately took it into full possession, exercising acts of sovereignty against the people of the opposite shore, in which latter case nevertheless the other neighbouring States, their fellow-borderers, shall be supposed to be lords of each of their particular ports, and of so much of the sea as the convenient access to the shore requires." Puffendorf states this rule in general terms as applicable to straits of greater or less width, and the principle of law so expressed is affirmed to its full extent in a very ancient English Law Treatise, which was compiled in the reign of King Edward II, namely, "La Somme appellé Mirroir des Justices." The author of the work, Andrew Horn, Chamberlain of the City of London, cites an ordinance of King Edward I, which enumerates amongst the *Jura Coronæ* "La Soveraigne Signiory de tout la terre jesqu'al milieu de la mere environt la terre!" Without however pressing the application of the principle of the *medium filum aquæ* in the present day to straits of an indefinite width, which nevertheless may have been of ancient days justifiable in the interest of maritime commerce with a view to put down piracy, the principle in its application to narrow straits is still in the present day highly convenient, and at the same time calculated to prevent controversy, and it has been maintained by Great Britain and by the United States of America to be the principle which regulates the general rights growing out

of the Law of Nations on the subject. Any other rule would be attended with inconvenient consequences, as regards the inviolability of the marginal waters of the one or the other State, if it should be neutral, whilst its opposite neighbour should be at war, and as regards the right of either State to seize vessels for a violation of its Revenue Laws or of its Laws of Health, if they should be guilty of any illicit act in the waters adjoining its coast. Vattel has omitted to treat the case of straits of which the opposite shores are in the possession of different States, possibly because instances of such straits were not frequent in his time. The Sound, for example, of which he justifies the toll levied upon passing vessels, was in his day under the exclusive Sovereignty of one and the same monarch, the Crowns of Norway and of Denmark being at that time united. But several cases of straits have come under consideration in modern times, in which the existence of two rival or independent jurisdictions over the same waters would have been found highly inconvenient. For instance, there are sea-passages, such as the Lymoon Pass, which separates the Island of Hong Kong from the Chinese Mainland, which is less than three miles in width, and over which neither Great Britain nor China claims exclusive jurisdiction, but either State is content with exercising its jurisdiction *ad medium filum aquæ.* The same principle of law was observed in the negotiations between Great Britain and the United States, which ended in the Conventions of 1803 and of 1807, in which, according to Mr. Justice Story, the middle of the channel between the islands belonging to the respective nations was taken to be the true and proper boundary line between them in accordance with the

general law of Nations. Professor Bluntschli[27] would therefore seem to have overlooked the received usage of Nations when he lays it down in his International Law Codified, that where two States are situated on the border of a free sea, so narrow that the zone of sea which forms part of the territory of the one overlaps the corresponding zone of the other, the two States are bound to accord to each other reciprocally rights of Sovereignty over the common space or to fix together a line of demarcation.

§ 184. Mr. Dudley Field, on the other hand, in his Draft Outlines of an International Code, says: "The limits of national territory bounded by a river or other stream, or by a strait, sound, or arm of the sea, the other shore of which is the territory of another Nation, extend outward to a point equidistant from the territory of the Nation occupying the opposite shore, or if there be a stream or navigable channel, to the thread of the stream, that is to say, to the mid-channel, or if there be several channels, to the middle of the principal one." The rule of the *medium filum* seems to recommend itself by its equity, whilst it satisfies the requirements of reciprocity, and a recent work on International Law from the pen of Professor F. de Martens of the University of St. Petersburg, states the general law on the subject of narrow Straits of the Sea in terms which accord with the rule which we have above stated. "Si un détroit se trouve sous la portée de canon d'un seul État, il est considéré comme dépendant de ce dernier et comme faisant partie de ses possessions territoriales. Si un détroit sépare deux États

[27] Le Droit International Codifié par M. Bluntschli, traduit de l'Allemand par M. G. Lardy. 3me édition. Paris, Guillaumin et Cie.

et n'a plus de 6 milles Anglais de large, on adopte comme frontière une ligne tracée au milieu des eaux." Such also seems to be the view adopted by M. Perels, Counsellor of the Admiralty of the German Empire, in his recent work on the International Public Sea Right of the present day, when he says: "As far as there is no limitation of the rights or obligations of either nation founded on Usage or Convention, the middle line of the water, in the case of bays or straits, after the analogy of rivers, has to be taken to be the limit of the sovereignty of each [28]." "Eine solche kommt namentlich bei Meerengen und Flussmündungen in Betracht. Man wird, so weit nicht observanzmässig oder conventionell eine Begrenzung der Rechte und Pflichten feststeht, analog wie bei der Flussgrenze, die Mittellinie des Gewässers als die Grenze der Souveränetät anzusehen haben [29]."

Right of fishery on the High Seas.

§ 185. The right of fishing in the open Sea or main Ocean is common to all Nations, on the same principle which sanctions the common right of navigation, namely, that he who fishes in the open Sea does no injury to any one, and the products of the Sea are in this respect inexhaustible and sufficient for all. It is possible indeed that one Nation may possess an exclusive right of navigation and fishing against another Nation, by virtue of treaty-engagements, as it is competent for a Nation to renounce a portion of its rights; and there have been instances of such renunciations both in ancient and modern times. Thus by the Treaty of Vienna, (16 March, 1731,) the House

[28] Traité de Droit International par F. de Martens, Professeur à l'Université de Saint Pétersbourg, traduit du Russe par Alfred Léo. Paris, 1883, p. 506.

[29] Das Internationale Öffentliche Seerecht der Gegenwart von F. Perels, Geh. Admiralitäts-Rath und vortragender Rath in der Kaiserl. Admiralität. Berlin, 1882, p. 42.

of Austria renounced in favour of the British and the Dutch the right of her subjects to send ships from the ports of the Low Countries to the East Indies. So by a Treaty concluded (anno 1500) between Henry VII of England and John II of Denmark, and by another treaty (anno 1523) concluded between Henry VIII of England and Christian II of Denmark, it was agreed that the merchants and fishermen of England should fish and traffic upon the Northern Sea betwixt Norway and Iceland, under the condition of first asking leave and renewing their Licences every seven years (de septennio in septennium) from the Kings of Denmark and their Successors. At a later period the Dutch appear to have admitted the exclusive right of the British to the fisheries in the North Sea, by making payment and taking out licences to fish, which payment and licences were afterwards suspended by Treaties between England and the Burgundian Princes. "All this," writes Grotius[30], after citing various instances of treaties from ancient history, "does not prove that those who thus *limited* the navigation of any other people had taken possession of the sea, or of the right to sail there. For Nations as well as private persons may give up not only that right, which is properly their own, but that also which they have in common with all mankind, in favour of him, for whose interest it is made." Treaties of this order have now fallen entirely into disuse.

Neutrality of jurisdictional waters.

§ 186. The Neutralization of portions of the Sea, that is, the exclusion of Foreign Nations from the use of its waters for belligerent purposes, does not conflict with those considerations of Natural Right, which forbid the exclusion of Foreign Nations from

[30] L. II. c. 3. § 4.

the peaceful use of its waters. It may be regarded as an established rule of Public Law, that a Nation may prohibit all acts of hostility on the part of other belligerent Nations within the limits of its Maritime Jurisdiction, including the open Sea along all its coasts within the distance of a marine league. The same privilege is enjoyed in respect of Bays or Sea-Chambers [31], that is, portions of the Sea cut off by lines drawn from one headland to another. The claim of Neutrality, however, cannot be maintained to the extent of prohibiting the armed vessels of a belligerent Power from passing over waters, claimed as neutral waters, with a view to an ulterior act of warfare against the Enemy. The act of passing inoffensively over such portions of water without any violence committed therein is not considered as any violation of Neutral privileges; such waters are regarded in times of war, equally as of peace, as the common thoroughfare of Nations, and no permission is required for liberty to pass through them; although they are privileged so far, that no actual acts of hostility may be committed within them. In certain cases the privilege of Neutrality seems to extend over portions of the Sea, which are not within the ordinary limits of the maritime jurisdiction of a Nation; as for instance, over arms of the Sea, and over broad Straits, such, for example, as the Strait which separates Ireland from Great Britain, commonly called St. George's Channel [32]. But this question belongs more properly to the Rights of Nations in time of War, and will be considered more fully in a

[31] Life of Sir Leoline Jenkins, T. II. p. 727, 728, 780. Opinion of the Attorney-General of the United States on the case of the Ship Grange, 14 May, anno 1793, T. I. p. 15. Waite's American State Papers, T. I. p. 73.

[32] Martens, Précis, § 42.

subsequent part of this work. Bynkershoek makes one exception to the violation of Neutral Waters, and supposes that if an enemy should be attacked upon the High Sea, and should take refuge within the jurisdictional waters of a Neutral Nation, the victor may pursue his vanquished foe *dum fervet opus*, and seize his prize within the jurisdiction of the Neutral State. Casaregis and some other foreign jurists maintain a similar doctrine; but Valin, Emérigon, Vattel, Azuni, and others are of an opposite opinion, and hold that when the flying enemy has entered the privileged limits of the Neutral Jurisdiction, he is under the safeguard of the Neutral Power. Lord Stowell[33] seems to consider that Bynkershoek's opinion is given with many qualifications, and expressly as an opinion which he did not find to have been adopted by any other writer, and Mr. Chancellor Kent[34] regards Bynkershoek's opinion as rested by him entirely on the authority and practice of the Dutch, and not confirmed either by the writings of Publicists or by the Usage of Nations. He holds, accordingly, that the opposite doctrine rests upon sounder views. In this equally as in any other case, a positive act of warfare would be in strict Law a violation of the privilege of the Neutral Power, which is entitled to protect all persons and property within its Maritime Jurisdiction. It is the privilege however of the Neutral Power alone to insist on the restoration of property captured within its Jurisdiction, and if there should have been extreme bad faith on the part of the worsted belligerent, as, for instance, if he should have lain in wait within the shelter of Neutral waters with a view to sally out suddenly, and take his adversary at a disadvantage,

[33] The Anna, 5 Robinson, p. 385.

[34] Commentaries on American Law, Tom. I. § 120.

with the intention, if he should be worsted, to take refuge again within the Neutral waters, the Neutral Power may with reason decline to extend its shield over the vanquished, if the enemy whom he has attacked should pursue him *dum fervet opus*, and capture him within the Maritime Jurisdiction of the Neutral Power. It is sometimes a matter of treaty-engagement [35] between two Nations, that neither shall permit the ships or goods belonging to the citizens or subjects of the other to be captured within cannon shot of their coast, or in any of the bays, ports, or rivers of their territory by the ships of war of a third Power.

Right of Maritime Toll in respect of Light-houses and Sea-marks.

§ 187. It is not contrary to the Law of Nature or that of Nations, writes Grotius [36], that those who shall take upon them the burden and charge of securing and assisting Navigation, either by erecting or maintaining Lighthouses, or by affixing Sea-marks to give notice of Rocks and Shoals, should impose a reasonable tax on all who sail that way. Martens classes this right amongst the *Jura litoris*. Azuni [37] considers that the Maritime Powers have a right to impose contributions upon all vessels, which are navigated within the limits of their Maritime Jurisdiction, to defray the expenses which are necessary to secure the safety or convenience of navigation. Accordingly if fire-beacons are kept alight on shore or afloat during the night, and buoys are placed upon the shoals to indicate the deep and shallow water passages, and skilful mariners acquainted with the dangers of the navigation are kept ready to act as pilots at the call

[35] Treaty between Great Britain and the United States, (anno 1794,) Art. 25. Martens, Recueil, V. p. 684.

[36] L. II. ch. III. § 14.

[37] Droit Maritime de l'Europe, L. IV. ch. IV. § 153.

of foreign vessels, and to conduct them safely along the coasts of a Nation; it is not contrary to the Law of Nature or of Nations that foreign vessels availing themselves of these aids to navigation, should be required to contribute to the expenses of maintaining them. Baldus[38] holds Sea-tolls to be most equitable in their nature, when they are levied to promote the security of navigation: "Vectigalia Maritima sunt æquissima, quoniam ad tuitionem maris et veram in eo securitatem præstandam constituta reperiuntur." Every vessel, which casts anchor within the jurisdictional waters of a Nation, becomes liable to the jurisdiction of that Nation in regard to all reasonable dues levied for the maintenance of the general safety of navigation along its coasts[39]. If a vessel merely passes along the coasts of a Nation without casting anchor within the limits of a marine league, or without entering any port or harbour, it is not subject to the payment of any territorial dues. The Right of Passage over all portions of the open Sea is one of the Natural Rights of Nations. It can only be made subject to conditions by established Custom, which implies an immemorial acquiescence on the part of all Nations.

Prescriptive Right of Sea Toll.

§ 188. The Right which a Nation has to levy contributions upon all ships which come within its Maritime Jurisdiction towards the maintenance of Lighthouses, Beacons, and other accessories to the safety of navigation, must not be confounded with a right which a nation may possess by Prescription to levy toll upon passing vessels[40]. The Sound Dues formerly levied by Denmark upon all vessels passing

The Sound Dues.

[38] Baldus, Tit. de rer. div. col. 2.

[39] Azuni, Droit Maritime, ch. II. Art. IV. p. 288.

[40] The Dukes of Savoy at one time levied a toll, under the name of Villefranche, on all vessels passing within eighteen miles distance from the port of Nice. Azuni, T. I. p. 281.

through the Sound and the Two Belts rested upon an immemorial prescription. The actual origin of these Dues is lost in the obscurity of a remote antiquity, and it must remain undetermined whether the Northmen, who were masters of the narrow Straits leading from the North Sea into the Baltic Sea, levied toll arbitrarily upon all passing vessels, as a consideration for permission to pass through the Straits unmolested, or as a compensation for expenses incurred by them in securing the safe navigation of the Baltic Sea by keeping it clear of pirates, and by maintaining Lights and Sea-marks to indicate the navigable channels. It is unquestionable, however, that, at the period when a system of Public Law began to regulate the intercourse of Nations, the claim to levy a toll upon a narrow Sea-passage, like the Sound and the Belts, was in strict conformity with the prevailing ideas as to the Right of Empire, which a Nation might exercise over straits of the Sea, the passage of which it could effectively control. Vattel [41], for instance, places the right of Denmark to levy customs on the passage of the Sound on the same foundation with the right of a Nation to establish tolls upon land or upon a river. Whatever may have been the origin of the Sound Dues, the absolute Right of Denmark to the control of the Sea-passages into the Baltic was acknowledged by the Hanse Towns in a treaty as early as 1368, and by England as early as 1490; and the payment of tolls on the passage of the Sound was recognised *as in previous use* (wie vor alters her), in a treaty concluded at Spires, anno 1544, between the Emperor Charles V and King Christian III of Denmark [42]. This treaty regulated the amount of the

[41] Droit des Gens, L. I. § 291.
[42] Schmauss, Corp. Jur. Gentium I. p. 258.

tolls, and formed a precedent for similar treaties between Denmark and other Nations[43]. This Right has accordingly been rested by Danish Jurists on immemorial Prescription, sanctioned by the concurrent evidence of a long series of Treaties recognising the existence of these tolls "as of olden time," and stipulating only as to the amount and mode of levying them.

The Sound Dues may henceforth be regarded as matters of history, rather than of practical interest, except as illustrating an Exceptional Right, which may have been in conformity with the General Law at the time of its origin, but which in modern times rested upon a very special foundation. The tolls were levied upon the tonnage of the ships and also upon the value of the goods laden on board, and the inconvenience to modern commerce, resulting from merchant vessels being obliged to bring up either at Elsinore if they passed through the Sound, or at Wyborg if they passed through the Great Belt, was found to be so great, that the maritime Nations of Europe[44] have entered into a Convention with Denmark to redeem the tolls for ever; in other words, to purchase for their own vessels the freedom of the navigation of the Sound and the Belts; and the United States of America, which had for a short time disputed the Prescriptive Right of Denmark as against a State of the New World, has followed the example of the European Powers, and has entered into similar Treaty-engagements with Denmark in behalf of American vessels[45].

[43] The treaty of 1645 is in Schmauss, I. p. 536.

[44] Treaty of Copenhagen, March 14, 1857. Martens, N. R. Gén. XVI. pt. II. p. 345.

[45] Treaty of Washington, April 11, 1857.

The Straits between the Mediterranean and the Black Sea.

§ 189. The exclusive Right which the Ottoman Porte exercises over the Straits and the intermediate sea which connect the Mediterranean with the Black Sea, rests upon a Prescription which has obtained the formal sanction of the Great Powers of Europe, under Conventions concluded between them and the Porte. The Right of the Porte had a lawful origin at the time when the shores of the Black Sea were in the exclusive possession of the Ottomans, but after Russia had made large territorial acquisitions on its shores, the latter Power, under the Common Law of European Nations, had a right to navigate the waters of the Black Sea, and to pass outwards with trading vessels into the Mediterranean. But the Ottoman Porte did not at that time acknowledge any Public Law in common with the Christian Powers of Europe, and the latter Powers had not the right, if they had possessed the might, to impose their system of law upon the Ottoman Nation. Accordingly as the Ottomans regarded no other law as binding upon them with regard to Christian Nations, than the express stipulations of treaties, the free navigation of the Straits was secured to the merchant vessels of Christian Nations by express Conventions on the part of the Porte, with Russia in 1774, with Austria in 1784, with Great Britain in 1799, with France in 1802, with Prussia in 1806. The Porte has meanwhile kept the Straits closed against the war-ships of all Nations during the time when it has itself remained at peace with all Nations, and this practice of the Porte obtained a formal sanction, as an ancient rule of the Ottoman Empire, from the Great European Powers with the exception of France, in the Treaty concluded in London, July 13, 1841[46]. It was sub-

[46] Martens, N. R. Gén. II. p. 128.

sequently confirmed more formally as part of the Public Law of Europe by a Special Convention, annexed to the Treaty of Peace concluded at Paris, March 30, 1856[47]. By a still later Treaty (Treaty of London, March 13, 1871)[48] the ancient rule of the Porte is maintained in force, but the Sultan has reserved to himself the faculty of opening the Straits in time of peace to the war-vessels of friendly and allied Powers in case the Sublime Porte may judge it to be necessary in order to secure the execution of the Stipulations of the Treaty of Paris of March 30, 1856.

The Comity of Nations in Matters of Revenue and Quarantine.

§ 190. There is a certain class of cases which seem at first sight to conflict with the position that a geographical league seawards along its coasts is the limit of the maritime jurisdiction of a Nation, and that beyond that distance its Civil Law is in operation only over its own National vessels. Thus the Statute Law of Great Britain (9 Geo. II. c. 35 and 24 Geo. III. c. 47), sometimes described as the Hovering Acts, authorises the National cruizers to seize all merchant vessels, which are found with certain cargoes on board destined for Ports of Great Britain, if they are found within the distance of four leagues from the Coast, and vessels so seized have been brought for adjudication before the tribunals of the seizors, and have been declared forfeited for an attempt at illicit trade. So, again, by 26 Geo. II. all vessels coming from places whence the plague might be brought, and as such liable to Quarantine, were required to make signals on meeting other ships within four leagues[49] of the United Kingdom under a penalty of 200*l.*

[47] Martens, N. R. Gén. T. XV. p. 782.

[48] Id. XVIII. p. 303.

[49] The distance, within which vessels are regarded as amenable to British Quarantine Regulations, is fixed at two leagues from the British Coasts by 6 Geo. IV. c. 78.

In a similar manner the Acts of Congress of the United States of North America, such as the Collection Act of 1799 and the Act of 1807 against the importation of slaves, authorised the seizure of vessels laden with certain cargoes within four leagues of the American Coasts. The regulations of Portugal and of Spain, excluding the commercial intercourse of foreigners with their respective Colonies, were of an analogous character. Such laws and regulations, however, have no foundation of *strict Right* against other Nations. Lord Stowell, in the well-known case of the Louis[50], alludes to an instance of this kind in the case of a Swedish Ordinance authorising Swedish cruizers to examine foreign vessels *on the high seas* bound to Swedish Ports, which however was resisted by the British Government as unlawful, and the claim was finally withdrawn by the Swedes. In a similar manner Great Britain complained of the right claimed by Spain to search British vessels on the High Seas, which was carried so far that the Spanish *guardacostas* seized vessels not in the neighbourhood of their coasts. This practice was the subject of long and fruitless negociations, and led at length to open war. Great Britain, however, did not contend that British vessels actually engaged in illicit trade were entitled to pass unmolested by the revenue cruizers of Spain until they came within the maritime jurisdiction of that country, but she maintained that Spain enforced her right of search for the protection of her commerce with her Colonies in an unreasonable and vexatious manner. Mr. Justice Story[51] has properly pointed out that the State which authorises her cruizers to effect such seizures beyond the limits of her Maritime Jurisdic-

[50] 2 Dodson, p. 246.

[51] The Mariana Flora, XI Wheaton, p. 40. Church v. Hubbard, 2 Cranch, p. 235.

tion, incurs a responsibility towards Foreign Powers. It is only under the *Comity of Nations*[52] in matters of Trade and Health, that a State can venture to enforce any portion of her Civil Law against foreign vessels, which have not as yet come within the limits of her Maritime Jurisdiction. A State exercises in matters of Trade for the protection of her Maritime Revenue, and in matters of Health for the protection of the lives of her people, a Permissive Jurisdiction, the extent of which does not appear to be limited within any certain marked boundaries, further than that it cannot be exercised within the Jurisdictional waters of any other State, and that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports[53]. If, indeed, the Revenue Laws or the Quarantine Regulations of a State should be such as to vex and harass unnecessarily foreign commerce, foreign Nations will resist their exercise. If, on the other hand, they are reasonable and necessary, they will be deferred to *ob reciprocam utilitatem.* In ordinary cases indeed, when a merchant ship has been seized on the open seas by the cruizer of a Foreign Power, when such ship was approaching the coasts of that Power with an intention to carry on illicit trade, the Nation, whose mercantile flag has been violated by the seizure, waives in practice its right to redress, those in charge of the offending ship being considered to have acted with *mala fides* and consequently to have forfeited all just claim to the protection of their Nation.

Right of Fishery in Jurisdictional Waters.

§ 191. The Right of Fishery comes under different considerations of Law from the Right of Navigation, as the Right of Fishery in the *open sea* within certain

[52] Kent's Commentaries, Tit. I. § 31.

[53] The Apollo, 9 Wheaton, p. 371.

limits may be the exclusive Right of a Nation. The *usus* of all parts of the open sea in respect of navigation is common to all Nations, but the *fructus* is distinguishable in law from the *usus*, and in respect of fish, or zoophites, or fossil substances, may belong in certain parts exclusively to an individual Nation. The Practice of Nations has sanctioned the exclusive Right of every Nation to the fisheries in the waters adjacent to its coasts within the limits of its Maritime Jurisdiction[54], and accordingly we find that a permission for the subjects of one Nation to fish within the Jurisdictional waters of another Nation is a frequent subject of Treaty-engagement. "The various uses of the sea," writes Vattel[55], "near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, &c. Now in all these respects its use is not inexhaustible; wherefore the Nation, to which the coasts belong, may appropriate to itself an advantage which Nature has so placed within its reach, as to enable it conveniently to make itself master of it and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? and though where the catching of (swimming) fish is the object, the fishery appears less liable to be exhausted, yet, if a Nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that Natural benefit, as an appendage to the country which it possesses, and to reserve to itself the great advantages which it may derive by commerce, in case there be a sufficient

[54] Wheaton's Elements, Part II. c. 4. § 5. Azuni, Tom. I. c. 11. Art. 8.

[55] Droit des Gens, L. I. § 287.

abundance of fish to enable it to furnish the neighbouring Nations with a supply? But, if so far from making itself master of a fishery, a Nation has once acknowledged the common right of other Nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it." Treaty-engagements in such matters do not give any other right than that which is expressed in the specific terms, although there may be found in the recitals of certain Treaties recognitions of Rights founded on grounds independent of all Treaties. Thus there are early Treaties between France and England, under which it was agreed that the Subjects of either Crown might fish anywhere in the seas, which separate the two kingdoms, during certain seasons of the year. The legitimate inference, deducible from the fact that such fishery was made a matter of Treaty-engagement, is, that at other seasons of the year the Subjects of the two Crowns had not a common right of fishing everywhere in those seas. The existing Treaty-engagements between Great Britain and France proceed upon another view of mutual convenience, namely, that it is desirable to define the limits within which the general right of fishing upon all parts of the coasts of either Nation shall be exclusively reserved to its own Subjects. The Convention of Paris (2 Aug. 1839[56]) has accordingly provided that the Subjects of either State shall enjoy *an exclusive right* of fishery within a distance of three miles from low water-mark along the whole extent of its coasts. There is one peculiar provision in this Convention, which deserves

Convention between Great Britain and France.

[56] Martens, N. R. XVI. p. 954. British and Foreign State Papers, vol. xxvii. p. 983

notice. By the Ninth Article it is stated to be the understanding of both parties that the distance of three miles, limiting the exclusive right of fishery upon the coasts of the two countries, shall be measured in the case of bays, of which the opening shall not exceed ten miles, from a straight line drawn across from one Cape to another[57].

Agreement between British and German Governments.

§ 192. It appears from a notice issued by the British Board of Trade of the date of December 1874[58], that the British Government came to an agreement with the North German Government in 1868 respecting Regulations to be observed by British fishermen fishing off the Coasts of the North German Confederation, and subsequently to a further agreement in 1874 with the German Government respecting Regulations to be observed by British fishermen fishing off the Coasts of the German Empire, and thereupon issued a notice for the guidance and warning of British fishermen. This notice implies a recognition upon the part of the British Government of the same principles of exclusive right to be enjoyed by German fishermen fishing off the North Sea Coast of the German Empire, as it has recognised under the Convention of Paris (August 2, 1839) in the case of French fishermen fishing off the Coast of France, and as it has maintained in the same Convention on behalf of British fishermen fishing off the British Coast. The notice is of the following tenor:—

I. The exclusive fishing limits of the German Empire are designated by the Imperial Government

[57] This Treaty, although operative in British waters, is not operative in French waters, not having been sanctioned by the French Legislative Chambers. Hertslet's Treaties, vol. XIV. p. 1200.

[58] Hertslet's Treaties, vol. XIV. p. 1057.

as follows :—That tract of the Sea which extends to a distance of three sea-miles from the extremest limit, which the ebb leaves dry of the German North Sea Coast, of the German islands or flats lying before it, as well as those bays or incurvations of the Coast which are ten sea-miles or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire.

II. The exclusive right of fishery within the above limits is accordingly to be enjoyed by fishermen of German nationality only, and English fishing boats are not at liberty to enter those limits, except under the following circumstances, namely :—

(1) When driven by stress of weather, or by evident danger.

(2) When carried in by contrary winds, by strong tides, or by any other cause beyond the control of the master and crew.

(3) When obliged by contrary winds or tides to beat up in order to reach their fishing grounds, and when from the same cause of contrary wind or tide, they could not, if they remained outside, be able to hold on their course to their fishery ground.

(4) When, during the herring fishing season, English fishing boats shall find it necessary to anchor under shelter of the German Coasts, in order to await the opportunity for proceeding to their fishing ground.

(5) When proceeding directly to any port of the German Empire, open to Englishmen for the sale of fish, where the cargo is to be sold.

III. Fishing boats not of German nationality, which pass within the limits above mentioned with-

out being compelled to do so by any of the circumstances above mentioned, and not being on their direct way to a port for the sale of fish, will be liable to be turned back; and in the event of their resisting, or in the event of their being found fishing within the limits above described, will be arrested and proceeded against before the nearest competent authority.

Ceremonial of the High Seas.

§ 193. The High Seas being the common highway of Nations, all Nations meet thereon on terms of equality. The Usage of Nations has accordingly established a Ceremonial of the Sea to be observed between the public vessels of different Nations, and between public and private vessels respectively which meet upon the High Seas[59].

The question of Maritime Ceremonial, as regards the High Seas, was at one time considered not to involve considerations of courtesy merely as between Nation and Nation, but to imply a recognition of superiority and an acknowledgment of inferiority, as the case might be, on the one side or on the other, and disputes on this head have frequently given occasion to war[60]. Nations, for instance, have claimed Rights of Sovereignty over considerable portions of the open Sea, and have insisted upon the public vessels of other Nations lowering their flag when sailing in those seas; or they have asserted a general Maritime supremacy, and insisted upon the public vessels of other Nations striking their flag to their armed ships, whenever they should meet them upon the High Seas. All these pretensions are now matters of

[59] Klüber, § 127. Martens, Précis, § 158. Bynkershoek de Dominio Maris, c. 1. and 4. Wheaton's Elements, Pt. II. c. 3. § 7.

[60] Ortolan, Diplomatie de la Mer, L. II. c. 15. Declaration of war by England against Holland, in 1652, and again in 1671.

History, and as far as salutes between the vessels of different Nations on the High Seas are concerned, whether those salutes consist in striking the flag, (salut de pavillon,) or in lowering the sails, (salut des voiles,) or in firing a certain number of guns, (salut du canon,) the Ceremonial is essentially a matter of courtesy. The Ceremonial as between public vessels is now confined entirely to a salute of guns. It is voluntary on either side, and it proceeds altogether upon a calculation of equality, as between Nations. All International salutes are therefore in strict practice to be returned gun for gun. In some cases this is matter of direct Convention between Nations; in other cases it is matter of courteous understanding between the commanders of the respective vessels; and Nations for the most part allow the commanders of their public vessels to reciprocate the special complimentary salutes, which the rules of their own service authorise in the case of one ship of war meeting another ship of war bearing the flag of an officer of superior rank. Thus a British [61] ship of war, bearing the broad pendant of a Commodore, on meeting a French ship of war bearing an Admiral's Flag, may salute the French Admiral personally with the same number of guns to which a British Officer of corresponding rank would be entitled. It is understood, however, that the saluting vessel in such a case will receive a salute of gun for gun in return. A French vessel, on the other hand, is authorised to return the salute of a foreign vessel gun for gun, whatever may be the rank of the respective commanders of the two vessels, provided that the salute does not exceed twenty-one guns, which is the number of guns, as generally un-

[61] British Regulations relating to Salutes.

derstood, for a Royal Salute [62]. The practice of most Nations is to salute with an uneven number of guns [63], but the regulations as to the number of guns to be fired on each occasion varies with the pleasure of each Nation. The following rules are general [64]. A single ship of war by usage salutes a fleet or squadron, and an auxiliary squadron salutes the principal fleet. A vessel carrying a Captain's flag, salutes a vessel carrying a Commodore's broad pendant; and the latter in turn salutes the flagship of an Admiral. With regard to merchant vessels, the practice which prevailed in former days for them to salute the public ships of all Nations, has fallen into desuetude. It was a practice grounded originally on the fact, that the public ships of all Nations keep sentinel over the safe navigation of the High Seas, and in discharge of such duty are entitled to ascertain the character of all vessels navigating thereupon. Merchant vessels were accordingly bound to strike their flag, and lower their topsails to every vessel of war which they met. As a matter of courtesy in modern times, merchant vessels for the most part salute the public vessels of other Nations by lowering and rehoisting their flag three times. Ships of war, indeed, are so far entitled to

[62] Ordonnance du Roi du 1 Juillet, 1831.

[63] It is stated by Martens, § 158, who is followed by Klüber, § 118, and several other publicists, "that Sweden is an exception to the rule of odd numbers, and that her vessels of war always salute with an even number of guns." The following are the regulations of the Swedish Navy, in the matter of naval salutes, published at Christiana, May 28, 1858. 1. A Swedish Man of War being saluted by a foreign vessel, answers the salute with the same number of guns. 2. No salute must exceed twenty-one guns, even in answering a salute. 3. In foreign harbours it is left to the discretion of the Commanders to follow the rules of other Nations. 4. The salutes in the Swedish Navy vary from five, seven, nine, &c., to twenty-one.

[64] Martens, Précis, § 160. Klüber, § 122.

maintain guard over the safe navigation of the high seas, that they may rightfully compel a vessel, which does not exhibit any flag, to announce her National character by hoisting her colours, and for this purpose they are accustomed to fire a gun with blank cartridge as a signal to the merchant vessel to hoist her colours; if she neglects the notice, they may fire a shotted gun across her bows, and if after that warning she declines to hoist her colours, a ship of war may treat her as a vessel of no certain Nationality, and may compel her to bring to.

The regulations with respect to salutes to be rendered by merchant vessels to ships of war of their own Nation, are matters of Municipal regulation, as well as those which relate to the special flag, which merchant vessels are entitled to carry; but it is an offence by the Laws of the Sea for any private ship to wear the flags or ensigns peculiar to the public ships of its Nation, unless it has a commission from the Sovereign Power, which authorises it so to do; for the Public flag of a Nation represents the Nation itself, and is privileged accordingly; whereas the Mercantile flag of a Nation has freedom of access allowed to it upon implied conditions of a totally different kind.

Ceremonial within Jurisdictional waters.

§ 194. There is an order of Maritime Ceremonial which may be distinguished from the Ceremonial observed on the High Seas, and which implies a recognition of the Empire of a Nation over the navigable waters within which the Ceremonial is observed. Every Nation has by usage a right to order a Ceremonial to be observed by the vessels of all Nations, which come within its Maritime Jurisdiction, in relation to its own National vessels or to the vessels of other Nations; and likewise in regard to

its own fortresses or naval arsenals [65]. Bynkershoek rests this right upon the ground that all who enter within the Maritime Jurisdiction of a State are for the time subjects of that State. This may be a correct view of the condition of Public Law, under which private vessels of commerce leave the High Seas and enter the jurisdictional waters of a Foreign Power; namely, that they become subject temporarily to the Territorial Law of that Power. With regard to such vessels, there is no necessity for any *special* Convention respecting matters of Maritime Ceremonial, as between Nations; but with regard to public vessels, which represent the Nation in its character of an Independent Power, the question is subject to different considerations. The salute on the part of a public vessel depends either upon the Usage of Nations, or upon Treaty-engagements [66]. By the Usage of Nations, ships of war always salute a fortress, if they pass within the limits of the Maritime Jurisdiction of the Nation to which the fortress belongs: they salute in like manner the guardship of a foreign port before they enter it, and the salute is reciprocated with the same number of guns, which tends to show that the salute is not a one-sided acknowledgment of temporary subjection, but is a mutual recognition of National Independence on either side. Nations in former times have asserted a right to exact a salute from the public ships of foreign Nations navigating narrow seas, or gulfs, as an acknowledgment of their having a right of Empire over such seas and gulfs [67]. Claims of this kind have

[65] Bynkershoek, Qu. Jur. Publici, L. II. c. 21. Klüber, § 120. Martens, Précis, § 159.

[66] In the treaties between the Barbary States, and the Christian States of Europe, the Salute was matter of arrangement as to the number of guns.

[67] Thus Great Britain once asserted a Right of Empire over

given rise to long and disastrous wars, and their regulation has been repeatedly the subject of negociations and treaties; they have now happily everywhere fallen into desuetude, seeing that the Ceremonial of the Salute is no longer connected with the idea of the supremacy of one Nation over another.

Origin of the Mercantile and of the Military Flag of the Sea.

§ 195. It would appear that from a very early period it was the custom for vessels of commerce navigating the High Seas to carry an ensign (insigne) or a flag (flamma) denoting the ownership of the vessel, whether that ownership was vested in an individual person or in a company. The Roman Law (Gaius, l. 3, ad Edictum Provinciale [68]) recognised companies or guilds of shipowners (naviculariі) in the Provinces, and it may be inferred from the medieval Statutes of the chief Maritime cities of the Mediterranean [69] and of the Baltic [70] that the practice of merchant vessels carrying the flag of a company or a guild (ars) was still maintained in the thirteenth century, and was only giving way under the pressure of Municipal Statutes requiring them to carry the flag of the city from which the vessel hailed. The character of the flag to be carried by merchant vessels is in like manner regulated in the present day by the municipal law of the port from which each vessel hails, and an international usage has grown up, which gives support to the municipal law, by requiring every merchant vessel to be furnished with a Sea Letter [71] or Certificate from the authorities of the

the British Channel; Venice over the Adriatic Sea; Genoa over the Ligurian Sea; Portugal over the Lusitanian Sea. Gunther, Tom. II. § 21–25.

[68] Justin. Digest. l. III. tit. IV. § 1.

[69] Statutes of Marseilles, a° 1253; Ancona, 1397.

[70] Statutes of Hamburg, a° 1270; Lubeck, 1299. See Twiss' Rights and Duties of Nations in Time of War, § 90.

[71] In the case of British mer-

port from which she hails, vouching her title to the flag which she carries, otherwise she may risk to be treated as a piratical vessel. At what time the custom became general for merchant vessels to carry a national flag is not very clear. The practice of vessels of war carrying a national ensign was most probably introduced at the time of the Crusades. Such is Cleirac's opinion as expressed in a memoir[72] appended to his "Us et Coutumes de la Mer," a° 1647; but the Ordinances of the Kings of France on the subject of the flag are not, as we believe, traceable further back than to an Ordinance of King Charles V of France of Dec. 7, 1373[73].

According to Cleirac, the object of a National flag was to classify the different bodies of troops and the various fleets of ships engaged in a Crusade, and the circumstance, that the national ensign of each of the Monarchical States of Christendom bore the emblem of a Cross, red, white, or gold as the case might be, on a field of a different colour, lends support to Cleirac's view. The Red Cross was the general device, which was granted by the Holy See to Princes and Cities that took part in the Crusades. The Red Cross on a silver field, known as St. George's Cross, was specially granted to the Kings of England and to the cities of Florence and of Genoa. It was also the flag of Portugal and of the city of Milan. The latter city retains the Red Cross, but the present Portuguese national ensign is per pale, blue and

chant ships by the Merchant Shipping Act, 17 & 18 Vict. ch. 106, in pursuance of a Royal Proclamation of Jan. 1, 1801.

[72] "Sur les livrées ou couleurs des Pavillons des Navires pour la connaissance et distinction de chaque Nation qui met à la mer."

[73] The text of this Ordinance is printed in the Appendix to the Black Book of the Admiralty, Rolls Edition, vol. I. p. 443, with its true date, from an unique MS. in the British Museum (Sloane MS. 2423).

white, and in the centre of the military flag is a red shield crowned and charged with towers, etc. England, on the other hand, has retained the St. George's Cross both in the Union Jack[74] and in her white Ensign, which is now the distinctive ensign carried by her vessels of war. The Royal Yacht Squadron, of which H.R.H. the Prince of Wales is Commodore, has the special privilege of using the white ensign, and this circumstance has led very recently to a refusal on the part of the Ottoman Authorities at the Dardanelles to allow a vessel of the Royal Yacht Squadron to pass the batteries at the mouth of the Straits, inasmuch as she exhibited an ensign usually worn by British vessels of war. The yacht in question was ultimately allowed to pass the Straits upon the anomaly having been explained to the satisfaction of the Ottoman Authorities.

It would seem that it rested with the admiral of each fleet in the days of the Crusades to assign to each vessel its proper ensign, and it was no longer permissible to the captain or owner to assume an ensign at his pleasure. The tradition has been maintained down to the present time, and the Admiralty of each Nation may be regarded in the present day as the administrative authority in all matters of the maritime flag. It is in accordance with this practice that in the recent charters granted by the Crown of Great Britain to the British North Borneo Company,

[74] The Union Flag was first adopted for British ships on the Union of the Crowns of England and Scotland in 1603, and it consisted of St. George's Cross, red on a white ground, combined with the Saltire of Scotland (St. Andrew's Cross), white on a blue ground. On the subsequent Union with Ireland in 1801 the Red Saltire of Ireland was introduced, counterchanged with that of Scotland. The blue field of the Union Jack is thus of Scotch origin, the flag of Ireland having been a red saltire on a white field.

there is a provision to the following effect: "The Company may hoist and use on its buildings and elsewhere in Borneo and on its vessels such distinctive flag, indicating the British character of the Company, as the Secretary of State and the Lords Commissioners of the Admiralty from time to time approve." Nevertheless, the practice of using a House flag, as it is termed, is still maintained by the owners of British Merchant Ships, for the purpose of corresponding with their agents either on shore or on the High Seas. The character and the colour of the House flag are at the discretion of each Shipowner, provided always that it does not resemble a flag used by the Ships of the State. All British Merchant Ships, on the other hand, are required to carry the Red Ensign, as it is termed, being the Union Jack in the hoist of a large red flag, as the national flag under which they sail. The House flag takes the place of the ancient flag of the port from which the vessel hailed, but its use is strictly subordinated to that of carrying the red ensign as the national colour.

Certain States entitled only to a Mercantile Flag.

§ 196. There are cases in which the right of a State to a flag for its merchant marine on the High Seas has been recognised under a General Treaty of the European Powers, whilst by the same Treaty the same State has been precluded from fitting out any vessel of war or using a flag of war on the High Seas. Such for instance is the provision made in the Treaty of Berlin of 1878 with regard to the Principality of Montenegro, of which the territory, formerly an *enclave* within the Turkish dominions without any outlet to the High Sea, is now placed in direct communication with the Adriatic through the cession on the part of Turkey of Antivari and all the Littoral between Antivari and the Dalmatian coast. In this

instance, however, under the provisions of the same treaty the port of Antivari and all the Montenegrin Littoral are declared to be closed against the war-vessels of all Nations, whilst Austria-Hungary has undertaken to maintain a maritime and sanitary police within Montenegrin waters, and to accord to the mercantile flag of Montenegro the protection of her Consular Officers. On the other hand, under the Convention of Paris of 5 Nov. 1815, between Great Britain, Austria, Russia, and Prussia, the contracting parties acknowledged the trading flag of the United States of the Ionian Islands to be the flag of a free and independent State, whilst all the ports and harbours of the said States were declared to be with respect to honorary and military rights within British jurisdiction for the more effectual furtherance of the Protection of His Britannic Majesty, under which the Ionian States were placed. Further, under the Constitutional Charter of the United Ionian States drawn up in pursuance of the Convention of 1815, Ionian Subjects were declared to be entitled in all ports whatsoever to the fullest protection of British Consuls. It deserves remark that in both these cases there were maritime ports, from which Ionian and Montenegrin merchant vessels could respectively be set forth and whither they could return, if it should be necessary for the State under whose flag they sailed to exercise its jurisdiction over the captain and crew in civil or criminal matters, for whilst the flag gave them protection, it also imposed upon them responsibility. Besides, merchant ships of olden time were for the most part owned in shares, and all controversies as to their employment and the profits of each voyage had to be settled by the law of the place where the part-owners were resident, and the law of

the place could not well be enforced unless the vessel was within the jurisdiction of its Courts. The use of a mercantile flag under treaty-arrangements of the kind above mentioned, although exceptional, was not at variance with the principles of the common law. For instance, the Free Cities of the late Germanic Confederation, such as Hamburg, Bremen, and Lübeck, which possessed either riverain or maritime ports, had a considerable marine under a mercantile flag, but had no maritime flag of war nor any military marine. The same remark applies to certain northern States of the same Confederation, such as Oldenburg, Mechlenburg, and Hanover.

The practice in all these instances was no doubt a relic of an older order of things, in which the merchant vessels of the Cities and States in question had been accustomed to regard the military flag of the Roman Emperor of the Germans as the flag of the Suzerain Power, who would be ready to protect the commerce of his vassals in time of war. The same observation is also applicable to certain tributary States of the Ottoman Empire, such for instance as Samos, which has a mercantile flag in the present day, and such as were the Moldo-Walachian Principalities under the Treaty of St. Petersburg of 29 Jan. 1834 (supr., p. 134). Egypt also seems to have a mercantile flag of her own[75], slightly distinguished

[75] In the case of the Charkier Steamship, the property of his Highness Ismail Pacha, Khedive of Egypt, against which a suit for damage was brought in the High Court of Admiralty of England, it was pleaded in the Protest against the jurisdiction of the Admiralty Court, that the steamship was a ship of the Egyptian branch of the Imperial Ottoman Navy, and was entitled to carry and did use and carry the Ottoman Naval Pendant and the Ottoman Naval Ensign, which are used by all ships of the Egyptian navy, as distinguished from Egyptian merchant vessels. Law Reports, Admiralty and Ecclesiastical Cases, vol. iv. p. 61.

from the Turkish mercantile flag, but Egypt is bound to hoist exclusively the military flag of Turkey on her war-vessels, if she should at any time with the express permission of the Sultan fit out any such vessels. In all these cases there has been a protecting Power or a Suzerain in reserve, whose military fleet would be available for the defence of the mercantile marine of the protected State or of the tributary State, as the case might be, and no city or State appears to have used a mercantile flag unless it possessed a port in the High Seas, or on a navigable river by which its vessels could pass to or from the High Seas.

Project of a Swiss Mercantile Flag.

§ 197. A question has been raised in the present day whether a State, which has no port in the High Seas nor any riverain port in direct communication with the High Seas, can rightfully authorise her citizens to hoist a national flag upon vessels, of which they have acquired the ownership by purchase or otherwise in a foreign port. The question was raised before the Federal Assembly of Switzerland in 1864 on the petition of certain Swiss citizens resident in Trieste in concert with other Swiss citizens resident in Smyrna and in Hamburgh and in St. Petersburgh, who were desirous to be authorised to hoist Swiss colours upon certain merchant vessels, which they proposed to purchase abroad. Various difficulties at once suggested themselves. The petitioners anticipated that the Swiss Flag would be respected on the High Seas by all belligerent vessels as a neutral flag, and that Swiss merchant vessels would be entitled to circulate everywhere without being subject to any restriction on the part of belligerents by reason of the neutrality of Switzerland. It is hardly necessary to observe that the Conventional Neutrality of the

Helvetic Confederation is territorial, and that a Swiss citizen, when he quits the territory of the Confederation, carries with him no personal privilege of neutrality any more than a personal obligation not to enter into the military service of a Belligerent Power. During the recent civil war in North America a Swiss citizen claimed the privilege of exporting cotton from a blockaded port of the Southern States in two vessels carrying the Swiss Flag, which he maintained to be entitled to pass outwards without restriction in virtue of the neutral character of the Swiss Confederation, but the cruisers of the Union captured his vessels, and the Federal Council of the Swiss Confederation declined to intervene on his behalf with the Government of the United States of America with a view to obtain the release of the captured vessels. Another difficulty in the case of Switzerland was founded on the physical condition of the territory of the Confederation, that it has no sea-port, and although two great Rivers of Europe have their respective sources in Swiss territory, namely the Rhine and the Rhone, no sea going vessels can ascend by either of these rivers to a Swiss port, from which it would be entitled to hail, if it were met with on the High Seas by a belligerent cruizer. Two modern writers on International Law have discussed the question involved in the Swiss Project, whether an inland State is entitled to a maritime flag for mercantile purposes. M. Charles Calvo[76] maintains the affirmative, when he says, "Les Etats qui ne sont pas situés au bord de la mer ont, comme les Etats Maritimes, le droit d'avoir une marine et un pavillon spécial, car on ne saurait contraindre une Nation à

[76] Le Droit International, par M. Charles Calvo, 3me édition, Paris, 1880, tom. 2. p. 113.

se servir de navires étrangers pour les besoins de son commerce. Ainsi en Suisse il a été dernièrement question de la création d'un pavillon maritime; rien ne s'opposait en droit; l'utilité pratique de la mesure peut seule être mise en doute." The observations of Professor Pasquale Fiore [77] on the same subject are very much to the same purpose: "La Svizzera voleva esercitare il diritto d'inalberare la bandiera marittima per la giusta ragione che esso è uno dei diritti di sovranità, e che nell' alto mare non può essere negato ad uno Stato di esercitare quei diritti, che non ledono la libertà del mare, e la libera navigazione. Certamente discutendo intorno al diritto astratto, era ben fondato quello che domandava quel Governo; nel fatto però dove abbandonare le sue pretese, perchè si ebbe con ragione a considerare che il diritto de coprire le proprie navi con la bandiera dello Stato suppone un complesso di condizioni di fatto necessarie per goderne, e alle quali non si può supplere con la volontà."

It may be gathered from the message transmitted from the Federal Council to the Federal Assembly of the Confederation [78], that in the case of Swiss-owned Steam Vessels plying on the Lake of Geneva or of Constance or on the Lago Maggiore between Swiss ports and French or German or Italian ports, as the case may be, the Captain is allowed to hoist a Swiss flag; and it is mentioned in the same message that when the Swiss Envoy to Japan entered the Port of Nagasaki his vessel hoisted the Swiss flag, to which due respect was paid by the vessels of the Maritime

[77] Trattato di Diritto Internazionale Publico, par Pasquale Fiore, Torino, 1879, vol. i. p. 324.

[78] Message du Conseil Fédéral à la Haute Assemblée Fédéralé concernant l'autorisation de faire usage du pavillon Fédéral (du 25 Novembre, 1864).

Powers then at anchor there in accordance with the rules that regulate the maritime Ceremonial of the Flag. Further, it appears that Switzerland has been invited to adhere to the Declaration of Paris on the subject of Maritime Warfare, and she has replied to the invitation in the affirmative. A Report was subsequently presented to the National Council of the Confederation on 13 Dec. 1864. The Message and the Report were both in favour of the Right of the Confederation to authorise Swiss citizens to use a mercantile flag on the High Seas, and also to grant Ship-papers to such Swiss citizens as should become owners of merchant ships navigating the High Seas, but as the Confederation had not as yet any Code of Maritime Law, the National Assembly ultimately rejected the project, and nothing further has been heard of it.

The Jerusalem or Terra Santa Flag.

§ 198. In the Message of the Federal Council above mentioned there occurs the following passage: "Il y a plusieurs Etats, qui exploitent la navigation sous leur propre pavillon sans toucher immédiatement à la mer. Aujourd'hui encore le pavillon de Jérusalem est généralement reconnu sur mer, bien que ce soit une ville d'intérieur. Si nous sommes bien informés, c'est le Prieur de Jérusalem, qui accorde l'autorisation de faire usage du Pavillon."

The flag in question, which is styled the Flag of Jerusalem, is also known by the title of the Flag of the Holy Land (la Terra Santa), and amongst the sailors of the Levant is often spoken of as "The Five Cross Flag." It is however generally entered in the Custom House books of the ports of the Levant as the Flag of Jerusalem, inasmuch as the Letters Patent, which vouch the flag, are signed by the Prior of the Latin Convents in Jerusalem, or by the Latin

Patriarch or an equivalent Officer of the Latin Church in the Holy City. The flag is in fact a large Red Cross on a White Field, with a small red cross in each of the four angles between the limbs of the Central Cross, and it is the same flag which is hoisted on the Latin Convents in Jerusalem. The origin of the flag is somewhat obscure, but the privileges to which it entitles a vessel in the ports of Syria and in other ports under the Sultan's dominion are considerable, and it is said to be granted only to French subjects, or at least exclusively to persons who are not Ottoman subjects. There is a circumstance, which might lead us to suppose that some mention of this flag would be found in the Treaties between the Sultan and the Kings of France, inasmuch as a vessel under this flag is treated by the Turkish authorities in every respect as a French vessel; the business of such a vessel in a Turkish port is transacted by the French Consul; the port dues are paid according to the French tariff, and all the maritime documents are made out in the French language; but there is no mention of any such flag in any of the treaties or capitulations between the Kings of France and the Ottoman Porte, of which the text has been made public. There is however a document, of which the text has not been published, as far as we are aware, and which is preserved in the Archives of the Ministry of Foreign Affairs in Paris[79], in which some allusion to this flag may possibly be found, namely,

[79] The Baron J. de Testa, in his Recueil des Traités de la Porte Ottomane, Tom. I. p. 22, says, "Le plus ancien document officiel Turc que nous connaissons à Paris se trouve aux Archives de l'Empire. C'est l'original de la lettre adressée en Sept. 1528, par Suléyman I. à François I. Il est conservé dans *l'armoire de fer*, où est gardé aussi le firman de 1604 en faveur *des Religieux de Jérusalem*, lequel n'est toutefois qu'une copie authentique de l'original."

the Firman granted by the Sultan Ahmed I. in 1604 to "Les Religieux de Jérusalem." The French authorities however consider the flag to be three or four centuries old, in which case it would seem to be in the nature of a House Flag of the Latin Convents, to which certain privileges have been attached in olden time in order to facilitate their procuring supplies; and as the Latin Convents were and are under French Protection, it is intelligible that vessels carrying the flag of the Latin Convents should also be under French Protection, and as such be entitled to the good offices of the French Consuls in all the ports of the Ottoman Empire. This view of the origin of the flag derives support from the fact that packages intended for the Latin Convents in Jerusalem and marked with "the Five Crosses" pass through the Ottoman Custom Houses in the present day duty free. The flag is in fact equivalent to a free pass, and the privilege of permitting it to be used is a source of revenue to the Prior of the Latin Convents. It has no claim to be regarded as a National Flag, for as already said, it is granted only to persons who are not Ottoman Subjects, and accordingly the recognition of such a flag in Ottoman Ports has but a very slight bearing upon the question, which was under the consideration of the Federal Council of the Swiss Confederation in 1864.

CHAPTER XII.

RIGHT OF LEGATION.

Origin of Legations—The Person of an Ambassador sacred—The Right of Legation an Imperfect Right—Reception of an Ambassador discretional—Conditional Reception of a Subject as a Foreign Minister—Various Orders of Diplomatic Agents—Classification of Public Ministers in the Eighteenth Century—Rule of the Congress of Vienna—Diplomatic Agents of the First Class—Diplomatic Agents of the Second Class—Diplomatic Agents of the Third and the Fourth Class—Resident Missions—Moldavian and Walachian Chargés d'Affaires formerly at the Ottoman Porte—Letters of Credence—Letters of Recommendation—Full Powers—Instructions—Ceremonial of Reception—The Sacred Character of an Ambassador — His Ex-Territoriality — Ex-Territoriality of the Ambassador's Hotel and of his Suite—The Ambassador's Jurisdiction over the *personnel* of the Embassy—Liability of an Ambassador to the Payment of Local Dues—Liberty of Religious Worship—Inviolability of an Ambassador passing through the Territory of a Third Power—Consuls not Diplomatic Agents.

Origin of Legations.

§ 199. NATIONS, being independent political communities not acknowledging any Political Superior, hold intercourse with one another upon terms of equality, and upon the presumption of mutual good faith. But the whole body of a Nation cannot confer with the whole body of another Nation, although the interests of an Independent Political Community may from time to time require it to enter into negociations with another Independent Political Community, not merely for the purpose of forming special Conventional Relations, but likewise with the object of maintaining its existing relations under the General Law. It thus becomes necessary that a Nation should depute one or

more individual members of its Body with full Powers on its behalf to negociate with another Nation, and it has been the practice of Nations to confide in the good faith of one another, that the Persons of their Representatives shall be in safe-keeping whilst they are within the jurisdiction of the Nation, to which they have been accredited.

The Person of an Ambassador Sacred.

§ 200. The word *Ambassador* or *Embassador* is derived by Wicquefort[1] from the Spanish word "Embiar," which signifies "to send." The Latin equivalent was *Legatus* or *Orator*[2], and such is the title given by the Roman Emperor of the Germans and by the States General of the Netherlands in their ancient records to their Ambassador accredited to the Ottoman Porte. Much which is found in the Digest of Justinian[3] in respect to *Legati* applies to delegates from the Provinces or *Municipia* of the Roman Empire, who were sent to the Capital with Commissions to advocate the interests of the Provincial or Municipal Bodies whom they represented. But the principle of Law, regarded as a Rule of Reason promulgated for the common good, which was applied by the Roman Jurists to questions which arose touching *Legati* of this order, are equally applicable to Ambassadors sent from one Independent State to another, and it is worthy of note that the Romans, who regarded foreigners as out of the pale of the *Jus Civile*[4], still held that the person of a foreigner was sacred, if he was invested with the representative character of his Nation. "Si quis legatum hostium pulsasset, contra

[1] Wicquefort, L'Ambassadeur et ses Fonctions, L. I. p. 3.

[2] Bynkershoek, De Foro Legatorum, L. I. c. 1.

[3] Dig. XLVIII. Tit. VI. § 7.

[4] Adversus hostem (peregrinum) æterna auctoritas esto; Law of the Twelve Tables. Gravina, de Jure Naturali, Gentium et XII Tabularum. Lipsiæ, 1737, p. 284.

Jus Gentium id commissum esse existimatur, quia *sancti habentur legati* [5]."

§ 201. The Right of Legation forms the first and principal head of the Voluntary Law of Nations in the system of Grotius [6]. This right belongs only to States which are independent, "qui summi imperii sunt compotes inter se." Every State, which is *sui juris*, is entitled to constitute a Representative and to accredit him to another State, which is willing to receive him. But a Nation is not obliged to receive a Representative Envoy from another Nation. Grotius holds that the Law of Nations does not require that all Ambassadors should be received, but that they are not to be excluded without just cause, and that such cause may exist either on the part of the person who sends, or the person who is sent. The instances, which Grotius [7] cites in illustration of the just causes of refusal, seem to resolve themselves into cases where the Nation which sends the Ambassador is considered to be an enemy, or where the person sent as Ambassador is supposed to be a man of bad faith, or where the Embassy itself is held not to be sent in good faith. Vattel [8], on the other hand, holds that a Sovereign cannot without very particular reasons refuse to admit and hear the Minister of a Friendly Power or of a Power with which he is at peace; but if there are good reasons for not admitting him into the heart of the country, the Sovereign may notify to the Minister,

The Right of Legation an Imperfect Right.

[5] Dig. L. Tit. VII. § 17. De Legationibus.

[6] Restat veniamus ad obligationes, quas ipsum per se jus illud Gentium, quod voluntarium dicitur, induxit: quo in genere præcipuum est caput de Jure Legationum. De Jure Belli et Pacis, L. II. c. 18. § 1.

[7] Ibid. L. II. c. 18. § III. 1. Causa esse potest ex eo qui mittit, ex eo qui mittitur, ex eo ob quod mittitur.

[8] Vattel, Droit des Gens, L. IV. c. 5. § 65.

that he will send proper persons to meet him at an appointed place on the frontier, there to receive his proposals. It then becomes the duty of the Foreign Minister to halt at the place assigned; it is sufficient that he obtains a hearing, as that is the utmost he has a right to expect. Klüber [9] considers that no Nation, except under Treaty-engagement to that effect, is bound to receive the Ambassador of another Nation, except when the purpose of the Mission is either to discuss or establish a Right contested by the other Nation, and the object in view cannot be attained in any other manner, or to terminate in an amicable way a dispute occasioned by an evident violation of Right on the part of the Nation to which the Mission is sent. Ch. De Martens [10] concurs with Klüber as to the cases in which alone a Nation is bound to receive an Embassy from another Nation. Wheaton [11], on the other hand, holds that "no State is obliged by the Positive Law of Nations to send or receive public Ministers, although the Usage and Comity of Nations seem to have established a reciprocal duty in that respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the relations to be maintained between different States by means of Diplomatic intercourse."

Reception of an Ambassador discretional.

§ 202. As a Nation is not under any perfect obligation to receive an Ambassador, it may annex such conditions as it pleases to his reception, short of anything affecting his personal inviolability. A Nation may refuse to receive a particular individual who has been accredited to it by another Nation, and instances

[9] Klüber, Droit des Gens, § 176.
[10] Guide Diplomatique, Tom. I. § 6.
[11] Elements, Part III. c. 1. § 2.

of such refusal are by no means unfrequent[12]. It is usual in the present day in order to avoid any misunderstanding, which might arise from the refusal of a Nation to receive the Envoy of another Nation on the ground of a personal objection, to intimate beforehand the name of the person whom it is proposed to accredit. This is an act of courtesy on the part of the Nation which makes the communication, but the practice is in itself reasonable and ought to be upheld; for if a diplomatic Envoy is not welcome to the Sovereign to whom he is sent, he cannot be expected to gain his confidence, and, unless he enjoys a certain amount of Personal consideration, his Public Character alone will fail to secure him that confidence.

Conditional Reception of a Subject as a Foreign Minister.

§ 203. A Nation may refuse to receive one of its own citizens as the Representative of a Foreign Power, and in some countries it is a State-Maxim that a Subject is not to be received in such a capacity. Such was the rule of the French[13] and Swedish[14] Courts, and likewise of the United Provinces[15]. But in recent times two French subjects have been accredited to and received by the French Court as the Representative Ministers of Foreign Powers, Count Pozzo di Borgo as Minister of Russia, and the Count de Bray as Minister of Bavaria. Ch. de Martens[16] speaks of both these distinguished Diplomatists as having been naturalised in the foreign countries which they respectively represented. This circumstance would

[12] Thus the King of Sweden refused in 1758 to receive Mr. Goderich, the British Envoy, who was thereupon under the necessity of returning home. So the King of Sardinia refused in 1792 to receive M. Semonville the Envoy from France.

[13] De Caillieres, Traité de la Manière de négocier avec les Souverains, c. 6. p. 72.

[14] Codex Legum Sueciæ, Tit. de Crimin. § 7.

[15] Bynkershoek, de Foro Legatorum, c. 11.

[16] Guide Diplomatique, Tom. I. c. 11. § 6.

tend to prevent all conflict in their case between the International Privileges of a Foreign Ambassador and the Civil Liabilities of a Natural-born Subject of the French Crown, inasmuch as it is provided by the Municipal Law of France that the quality of a Frenchman is lost by Naturalisation acquired in a foreign country [17]. A similar rule of Law obtains in most countries, but Great Britain was an exception, as before 1870 she did not allow a Natural-born Subject to renounce or discharge his allegiance to the Crown of Great Britain and Ireland under any circumstances [18]. "Nemo potest exuere patriam" was an Imperial maxim, which British tribunals strictly upheld. But under the Naturalisation Act, 1870, (33 Vict. ch. 14,) a British subject, on becoming naturalised in a foreign State, now loses his British national character.

It seems open to question, if a Sovereign Power has consented to receive, as the Representative of a foreign Nation, one of its own Natural-born Subjects without any express reservation of its Sovereign authority over him, and in a case in which such authority has not been divested under some general provision of its Municipal law, whether such an unconditional reception is not a waiver of all authority, which it might otherwise assert over him on the ground of his origin. Wheaton inclines to think that the unconditional reception of a Subject in the character of a Representative of a foreign Nation is a waiver of all personal jurisdiction over him on the

[17] La qualité de Français se perdra par la naturalisation acquise en pays étranger. Code Civile, Art. 17.

[18] Blackstone's Commentaries, Tom. II. c. 135. This is a relic of the period when the conception of "territorial Sovereignty" was imperfectly developed.

part of the Sovereign who has received him [19]. Sir Robert Phillimore [20] is of opinion that if a Subject be received without any previously promulgated stipulation upon the part of his own Sovereign who receives him, he will be entitled to the full *Jus legationis*. Vattel in discussing this question says, that "a Natural-born Subject of a State may, without renouncing his country for ever, become independent of it during the whole time that he spends in the service of a foreign Prince;" and the presumption is certainly in favour of such independence, for the *Status* and Functions of a Public Minister naturally require, that he should depend only on his Master or the Prince who has intrusted him with the management of his affairs. Whenever, therefore, there does not exist any circumstance which furnishes a proof or indication to the contrary, a Foreign Minister, though antecedently a Subject of the State to which he is accredited, is reputed to be absolutely independent of it during the whole time of his Commission. If his original Sovereign does not choose to allow him such independence within his dominions, he may refuse to admit him in the character of a Foreign Minister [21].

Various Orders of Diplomatic Agents.

§ 204. In the early intercourse of European Nations a distinction of title amongst Diplomatic Agents was unknown. They were indifferently styled in Latin documents *Legati* or *Oratores*, and in more modern records they are designated Ambassadeurs, Ambasciadori, or Embascadores, respectively in French, Italian, and Spanish records. Grotius treats of *Legati* under a single head. The vanity of Princes in regard to Cere-

[19] Elements, Part III. c. 1. § 15.
[20] Commentaries, Tom. II. c. 135.
[21] Droit des Gens, L. IV. c. 8. § 112.

monial on the one hand, and motives of parsimony on the other, contributed to introduce a distinction in or about the 15th Century between Diplomatic Agents who should represent the *personal dignity* as well as the *independent rights* of their Sovereign, and diplomatic agents who should represent *the affairs* alone of the Sovereign who accredited them. Louis XI of France is said to have been the first of the European Sovereigns, who accredited to another Sovereign Power a Public Minister to represent him in the conduct of his affairs only, and not in respect of his personal dignity; and his example led the way to the introduction of two distinct classes of diplomatic Agents, a higher class representing the dignity of the *person* of their Constituent as well as his *affairs*, and a lower class simply representing him in the transaction of his *affairs*.

At the time when Vattel wrote his work on the Law of Nations a third degree of Representation had become established by Custom, and Vattel divides accordingly the Diplomatic Body into Ambassadors, Envoys, and Residents. In the Treaty of Peace concluded at Passarovitz[20] between the Emperor Charles VI and the Sultan Ahmed III (anno 1718) we find mention of three classes of Public Ministers as distinguished from the simple Agent[21], the latter of whom, if his functions were not commercial, was included in the protection of the same Treaty-stipulations which guaranteed the personal safety of other Public Ministers.

[20] Ministri porro Cæsarei, sive Oratoris, sive Ablegati, sive Residentis, sive Agentis munere fungantur. Schmauss, Corp. Jur. Gent. Academ. p. 1703.

[21] In the Treaty of Commerce and Navigation concluded at the same time and place between the same Powers, Agents are mentioned in the list of Officials connected with Commerce: pariter Consules, Vice-Consules, Agentes, Factores, Interpretes. Schmauss, p. 1717.

It is not easy to ascertain the precise line of demarcation, which distinguished the functions of the *Resident* from those of the *Envoy*, for the third class of Diplomatic Agents was more frequently entrusted with the negociation of affairs of State than the Envoy; but the office of Resident seems to have been held in less honour and consideration than that of Envoy, and it was frequently delegated to a subject of the State, to which the Resident was accredited. The title of Resident appears also to have been sometimes conferred upon persons who were only entrusted with the management of the *private affairs* of a Sovereign. The functions of the simple *Agent* on the other hand seem to have been originally very indefinite. Vattel speaks of him as having been formerly a kind of public Minister; but the title of Agent in Vattel's time had come in practice to be confined to persons appointed by Princes exclusively to transact their private affairs, and who were not unfrequently subjects of the Country where they resided. Such *Agents* are not the bearers of Letters of Credence properly speaking, and they are consequently not Public Ministers, nor under the protection of the Law of Nations, as such. *Residents* also appear sometimes not to have been furnished with Letters of Credence, and under such circumstances the *title* alone of Resident was no protection to them. This may serve as an explanation of the fact alluded to by Bynkershoek [22], that Wicquefort, who was a native of Amsterdam, was in the military service of the States General at the time when he was appointed the Resident of the Duke of Luneburg at the Hague. Wicquefort, notwithstanding his office of Resident, was cited before a Dutch Court and condemned to

[22] De Foro Legatorum, c. 11.

imprisonment for life. Bynkershoek holds that the office of Resident did not, under the Law of Nations, exempt Wicquefort from the jurisdiction of the Dutch Courts. The Office of Resident, as exercised in his case, seems to have differed very little from the office of a Consul or Commercial Agent, for Vattel[23] speaks of "Dutch Merchants who obtain the title of Residents of certain foreign Princes, and nevertheless continue to carry on their commerce, thereby sufficiently denoting that they remain subjects of the States General."

Classification of Public Ministers in the 18th Century.

§ 205. The Law of Nations, antecedently to the institution of permanent Foreign Missions at the different European Courts, did not recognise any distinction of Class or Order amongst Public Ministers. Each Minister or Envoy received such special consideration as the nature of his Mission entitled him to. But with the introduction of permanent missions, a question of Ceremonial and Precedence arose amongst the Representatives of Foreign Sovereigns at each Court. The Ambassador was received with higher honours, and took precedence of the Envoy. The Envoy, on the other hand, had precedence of the Resident; the Resident in his turn, being a Public Minister, took precedence of the Agent, whose duties were confined to the private affairs of his Sovereign. Such and so many were the grades of the diplomatic hierarchy at the commencement of the Eighteenth Century. The Agent has for the most part disappeared, and is replaced by the Chargé d'Affaires, but the French mission in Spain still retains amongst the *personnel* of its establishment *an Agent of the French Nation*, who is charged with the conduct of

[23] Vattel, L. IV. c. 8. § 112.

the affairs of his countrymen, which are of a secondary order [24].

In the course of the Eighteenth Century a practice was introduced of accrediting public *Ministers* without any particular designation of rank or character. Vattel [25] states that this expedient was adopted to avoid dispute about precedence. Custom had at such time established a particular Ceremonial for the Ambassador, the Envoy, and the Resident, but such custom did not altogether prevent disputes between the Ministers of different Princes accredited to the same Court, as to their respective rank and precedence; more particularly when they happened to belong to the same Class or Order. Thus the Ambassador of an Emperor might claim to take precedence of the Ambassador of a King, by reason of the precedence which the Emperor himself claimed over all Kings. A King, on the other hand, might be indisposed to allow his Ambassador to concede precedence to the Ambassador of an Emperor, yet he might be equally indisposed to incur the risk of hostilities with the Emperor. Under such circumstances by accrediting his own Minister under the simple and indeterminate title of *Minister*, he could allow him to concede precedence to the Ambassador of an Emperor without compromising the dignity of his Crown.

We thus find the title of *Minister Plenipotentiary* introduced, such Minister Plenipotentiary taking rank immediately after an Ambassador. The office of Minister Plenipotentiary came gradually to be united with that of Envoy Extraordinary, and was placed in the same rank. Ministers Resident and Ministers Chargés d'Affaires shortly afterwards completed the

[24] Ch. de Martens, Guide Diplomatique, Tom. I. § 12.
[25] Droit des Gens, L. IV. § 74.

Catalogue, which we find in general acceptance at the commencement of the Nineteenth Century.

Rule of the Congress of Vienna.

§ 206. The precise rank and precedence however of Diplomatic Agents was not a matter universally agreed upon amongst the Nations of Europe, until the Powers assembled in Congress at Vienna came to a common understanding on the subject, and established Three Classes [26]:

1. Ambassadors, Legates or Nuncios.

2. Envoys, Ministers, and others accredited to Sovereigns, (auprès des Souverains.)

3. Chargés d'Affaires accredited to Ministers of Foreign Affairs.

This classification proceeded upon a very intelligible distinction between the functions exercised by each Class. The Ambassador is accredited by a Sovereign to a Sovereign, and represents the *personal dignity* of his Constituent, as well as the *public affairs* of the Nation over which his Constituent rules. The Envoy or Minister is similarly accredited by a Sovereign to a Sovereign, but he represents only *the affairs of the Nation* over which his Constituent rules. The Chargé d'Affaires is not accredited by the Sovereign to the Sovereign, but is accredited by the Minister of Foreign Affairs to the Minister of Foreign Affairs. At the subsequent Congress of Aix-la-Chapelle, (21 Nov. 1818,) the five Great Powers there assembled agreed to institute a Class intermediate between the Envoy and the Chargé d'Affaires, to which they gave the title of *Ministers Resident* accredited to Sovereigns. The distinction thus introduced was not very logical, seeing that the

[26] Règlement sur le rang entre les Agens Diplomatiques, being the seventeenth of the documents annexed to the Final Act of the Congress. Martens, N. R. II. p. 449.

extent of the second Class remained the same, and that the second is sufficiently large to include the third. The reasons for the introduction of this intermediate Class may be traced to the unwillingness of the Great Continental Powers to allow their Ministers of the Second Class to give way to the Ministers of the same Class who represented the Minor Powers of Germany, and who might be entitled by Seniority, agreeably to the regulations of the Congress of Vienna, to take precedence of the Envoys of the Great Powers. The introduction of a Third Class under the title of Ministers Resident, accredited to Sovereigns, enabled the Minor Powers to avoid all contest with the Great Powers, and at the same time to have the services of Diplomatic Agents who were Public Ministers properly speaking.

Diplomatic Agents of the First Class.

§ 207. Diplomatic Agents of the first class alone enjoy by the Custom of Nations, as well as under the regulations of the Congress of Vienna, the full attributes of the Representative Character. They are accordingly entitled to the same honours as would be paid to the *person* of the Sovereign, whom they respectively represent. The precise nature of the Ceremonial, to which Ambassadors are entitled, depends upon the usage of the particular State to which they are accredited. It was provided by the fifth of the Rules adopted at the Congress of Vienna, that each State should settle an uniform mode of reception for Diplomatic Agents of each Class, so that the discretion of each State is left unfettered, provided it is not guilty of partiality towards the Representative of any one State. The third of the same rules provided, that Diplomatic Agents on an extraordinary Mission should not by reason thereof (à ce titre) enjoy any superiority of rank; so that the

Ambassador Extraordinary can claim no privilege or precedence over the Ordinary Ambassador. The Papal Nuncio [27] at present takes his place amongst the Ambassadors in the order of Seniority, as it is provided by the fourth of the same rules, that Diplomatic Agents of the same Class shall take rank and precedence according to the date of the official notification of their arrival at the Court to which they are accredited.

The practice of accrediting Diplomatic Agents of the first Class is confined to the States which are entitled to *Royal Honours*. Such Honours were formerly enjoyed exclusively by Monarchical States, and the Republics of Venice and of the United Netherlands were for some time exceptional instances of such honours being shared by States not having a Monarchical form of Government; at the same time, the Ambassadors of these powerful Republics were accustomed to yield precedence to the Representatives of Crowned Heads [28]. The Grand Duchies of Germany, the Electorate of Hesse, and the Germanic Confederation, were European States entitled to Royal Honours, and they were accordingly entitled to accredit Diplomatic Agents of the first Class. The rank and precedence of Sovereign Princes are not determined by any Conventional rule analogous to that which determines the rank and precedence of their Diplomatic Agents; but amongst Sovereign Princes entitled to Royal Honours, the custom prevails for such, as have not the title of Emperor or King, to concede precedence on all occasions to

[27] The Ambassadors of the Roman Catholic Princes, including the Roman Emperor of the Germans, were accustomed in former times to cede precedence to the Papal Nuncio, but those of Russia and the Ottoman Porte did not recognise any such rule.

[28] Vattel, Droit des Gens, L. II. § 38. Klüber, § 91.

Emperors and Kings. There existed in Europe, before the establishment of the German Empire in 1871, several Independent Princes who did not enjoy Royal Honours; such, for instance, as the Members of the Germanic Confederation below the rank of Grand Duke or Elector. These yielded precedence to Princes entitled to Royal Honours. There are also European States which enjoy an Independence modified by Treaties, such as Monaco and San Marino. Such States rank after all the States which enjoy an absolute Independence, and under the provisions of the Conventions, by which their Independence is modified, are represented for all political purposes by the Diplomatic Agents of the Protecting Power. The rules of precedence, which are observed amongst Independent Sovereign Powers, rest upon Usage and general acquiescence. The question of determining the relative rank of Independent States by a positive Compact, was taken into consideration at the Congress of Vienna; but difficulties having arisen in regard to the rank to be assigned to the Great Republics[29], the further discussion of the question was adjourned indefinitely, and the Con-

[29] The title of courtesy of a Great Republic, such as Venice and Genoa, was *Serenissima Respublica*. A similar title is in the present day assigned to Confederations. Thus the Germanic Confederation was addressed by the title of "the Most Serene," and Diplomatic Agents were accredited to the Most Serene Sovereign Princes and Free Cities of the Germanic Confederation. Titles of a Religious character, originally conferred by the Holy See, are still used in addressing certain Sovereign Princes. Thus the titles of the Very Christian or Most Christian King and Firstborn Son of the Church, are given to the Kings of France; the King of Spain has been styled, since 1496, the Catholic King; the Kings of England, since 1591, Defenders of the Faith; the King of Poland, the Orthodox King; the King of Portugal, since 1748, the Very Faithful King; the King of Hungary, since 1758, the Apostolic King.

gress limited its action to the regulation of the rank and precedence of the Diplomatic Agents of Independent States [30].

Diplomatic Agents of the Second Class.

§ 208. The second Order of Diplomatic Agents includes Envoys, Envoys Extraordinary, Ministers Plenipotentiary, and Internuncios [31]. Diplomatic Agents of the second Class are not clothed with the peculiar character which attaches to diplomatic Agents of the first Class, and which is derived from the dignity of the Sovereign whom they represent. Accordingly, they cannot demand *of right* a personal audience of the Sovereign to whom they are accredited. Such a Right is the distinctive privilege of a Diplomatic Agent of the first Class. In all other matters which concern him, as the Mandatary of his Nation, a diplomatic agent of the second Class does not differ in any material respect from a Diplomatic Agent of the first Class. There was a period when the *etiquette* of European Courts confined the privilege of personal intercourse with the Sovereign, at whose Court he was accredited, to an Ambassador as distinguished from an Envoy, but the usage of the present day authorises Diplomatic Agents of the second Class to confer personally on suitable occasions with the Sovereign to whom they are accredited. The privilege of personal intercourse with the Sovereign in the case of an Ambassador was not at any time considered to give to verbal conferences with the Sovereign the character of Official acts binding

[30] Klüber, Droit des Gens, § 94.

[31] The Austrian Internuncio at Constantinople took precedence formerly, under treaties with the Ottoman Porte, of all Ministers of the Second Order. The regulation of the Congress of Vienna is now observed by the Porte. Ch. de Martens, Guide Diplomatique, c. 10. § 65. Comte du Garden, Traité Complet de Diplomatie, L. 5. § 3.

upon his government. International Negociations were then, as now, conducted through a Minister of Foreign Affairs, and it was through him alone that binding Official acts could be concluded by an Ambassador. In the present day the observation is still more generally applicable, as wherever the Monarchical form of Government is combined with Representative institutions, the Sovereign can only bind the Nation through the agency of a Responsible Minister[32].

Diplomatic Agents of the Third and the Fourth Class.

§ 209. The third Order of Diplomatic Agents comprises Ministers, Resident Ministers, Residents, Ministers Chargés d'Affaires. The distinction between the Minister Chargé d'Affaires, and the simple Chargé d'Affaires, who ranks in the fourth Class of Diplomatic Agents, consists in the circumstance that the former is accredited by the Sovereign to the Sovereign as Minister, the title of Minister being engrafted upon that of Chargé d'Affaires[33]. Martens cites as an early example of this particular species of Diplomatic Agent, the *Minister Chargé d'Affaires* of the King of Sweden accredited to the Padichah of the Ottomans in 1784[34]. The fourth Order consists of Diplomatic Agents accredited by the Minister of Foreign Affairs to the Minister of Foreign Affairs. These are either sent out originally with express Credentials from the Minister of Foreign Affairs as Chargés d'Affaires, or have been sent out originally furnished with a Commission from the Sovereign, as Secretaries of Embassy or Secretaries of Legation ; and in the latter case they are orally invested with the Charge of the Embassy or Legation by the Ambassador or Minister himself

[32] Envoys as distinguished from Ambassadors, (Oratores or Legati,) are designated in Latin, *Inviati* or *Ablegati*.

[33] Credentials from the Sovereign are necessary to give to the Chargé d'Affaires the character of Minister *ad interim*.

[34] Précis du Droit des Gens, T. II. § 194.

to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the Minister of Foreign Affairs of the Court to which he is accredited. This fourth Order of Diplomatic Agent is not entitled to confer with the Chief of the State, but only with the Minister of Foreign Affairs to whom he is accredited, and this rule is maintained in the case of Republics, as well as of Monarchical States. Wheaton cites an instance from the Archives of the United States, in which the Secretary of State for Foreign Affairs notified formally to the Chargé d'Affaires of an European Power of the highest rank, that "he could hold official intercourse only with a Department of State; that he had no right to converse with the President on matters of business, and might consider it a liberal courtesy, if he was presented to him at all[35]." *Consuls*, as such, are Commercial not Political Agents, and accordingly do not belong to any of the four Orders of Diplomatic Agents, but the office of Chargé d'Affaires is sometimes combined with that of Consul-General in the same individual, who has thus the character of a Diplomatic Agent engrafted upon the Commercial character of Consul.

Resident Missions.

§ 210. Every Nation may determine for itself in what character it will accredit a Diplomatic Agent, whether it will confer upon him, by its Credentials, the full Representative character which belongs to the Ambassador or highest class of Diplomatic Agent, or will only confer upon him limited rank. But this absolute discretion upon the part of a Nation to accredit its Diplomatic Agents under any character

[35] Elements, Part III. c. 1. § 6. The President, under the Constitution of the United States, receives Ambassadors and other public Ministers.

which it may choose, is limited to occasional and temporary Missions, as distinguished from Missions permanently resident at a Foreign Court. No Nation can insist as a matter of Right, that a Diplomatic Agent on its behalf shall be permanently entertained by another Nation. Grotius[36] held that Permanent Legations (assiduæ legationes) might be with right excluded by all Nations, but the practice to maintain Resident Legations at Foreign Courts had in the course of the following century become so general amongst the European Nations, that Vattel[37], whilst holding that a Nation is not under an obligation to suffer at all times the residence of a Foreign Minister, is of opinion, that any Nation, which refuses to entertain a Resident Minister from a Foreign Power, must allege very good reasons for its conduct in this respect, if it wishes to avoid giving offence. Such reasons may arise from particular circumstances, but there are also ordinary reasons which may be always in force, such as relate to the constitution of a Government and the State of a Nation. In the absence however of any such reason, the Usage of two centuries may now be said to justify the Nations of Europe in relying upon the Comity of one another to entertain permanently their duly accredited Diplomatic Agents. As the same Usage, however, requires in regard to Resident Missions, that Nations should accredit and receive Diplomatic Agents of equal rank, the special rank of the Diplomatic Agents to be accredited and entertained on either side must be a subject of mutual agreement between States. The practice of accredit-

[36] Optimo autem jure rejici possunt, quæ nunc in usu sunt legationes assiduæ, quibus quam non sit opus docet mos antiquus, cui illæ ignoratæ.—De Jure B. et P. L. II. c. 18. § 3.

[37] Droit des Gens, L. 4. § 66.

ing and entertaining Ministers of the first Class has been hitherto confined to Crowned Heads, Sovereign Princes enjoying Royal Honours, and the Great Republics. There is no rule which prevents a Nation accrediting several Diplomatic Agents of equal or unequal rank to the same Nation, or the same person as its Diplomatic Agent to several Nations[38]. On the other hand, the same person may be accredited to the same Court by one Sovereign Prince as his Ambassador, and by another Sovereign Prince as his Envoy Extraordinary, or by both Princes as their Envoy Extraordinary. Thus the Austrian Ambassador used frequently to have separate Credentials to Foreign Courts, as Envoy Extraordinary of the Duke of Parma. The Prussian Minister in former days had for the most part Credentials from the King of Prussia and from the Grand Duke of Saxe.

Moldavian and Walachian Chargés d'Affaires at the Ottoman Porte.

§ 211. Agents for the private affairs of Princes, and such as have only the title of *Resident* or Counsellor of Legation or Agent, are not members of the Diplomatic Body, in other words, they do not represent their respective Nations for Political Purposes, and they are not entitled to any Diplomatic privilege or immunity. To this class belonged the Chargés d'Affaires of the Hospodars of Moldavia and Walachia, who resided at the Ottoman Porte, and for whom the Emperor of Russia stipulated by the sixteenth Article of the Treaty of Kutschuk Kainardjì, (anno 1774[39],) that they should be treated by the Porte with kind-

[38] It was not an unusual practice for Non-Germanic Powers to accredit one and the same Minister to divers States of the Germanic Confederation.

[39] Marten's Recueil, Tom. II. p. 305. Lesquels veilleront aux affaires concernant les dites Principalités, et seront traités avec bonté de la Porte, et non obstant leur peu d'importance considerés comme personnes jouissant du Droit des Gens, c'est à dire à l'abri de toute violence.

ness, and notwithstanding their little importance, should be considered as persons so far enjoying the Right of Nations, as to be safe from personal violence. This was an exceptional case founded altogether on the provisions of a special Convention, whereby the Porte agreed to restrict the exercise of its Rights of Sovereignty over certain of its own Subjects, whilst charged with the functions of Agent on behalf of the Hospodars at the central seat of the Ottoman Government. But this Treaty-engagement did not confer the Diplomatic Character on these Chargés d'Affaires, nor were they received into the body of Diplomatic Agents resident at the Ottoman Porte[40].

Letters of Credence.

§ 212. A Public Minister, who is sent to represent his Sovereign at the Court of another Sovereign, ought to be expressly authorised for that purpose, and the Sovereign to whom the mission of the Minister is addressed, ought to be duly certified of his authority to present himself as the Representative of his Sovereign. Every Public Minister is accordingly furnished by the Sovereign or Chief of the State, which delegates him, with Letters of Credence, (Literæ fidei sive credentiales,) which are addressed to the Sovereign or Chief of the State in the case of States which are under a permanent Sovereign or chief Magistrate; but in the case of Unions or Confederations of States, which are for the most part under a temporary Pre-

[40] These Chargés d'Affaires were properly speaking Agents for the affairs of the Principalities, transacting business with the Home Department at Constantinople. It had been the practice in the Ottoman Empire for the Governors of Provinces to be represented at the Central Seat of Administration by an Agent, (termed in the Turkish language, Kayson Kehagasi,) and as the lives of such agents were always in jeopardy, if a political crisis arose, a stipulation for the safe conduct of the Agents of the two Principalities was introduced into the Treaty of Kutschuk Kainardji.

sident, the letters of Credence are addressed to the States themselves. The reason for this distinction of practice in the case of Unions or Confederations of States is to be found in the circumstance, that as the President of an Union or Confederation is a temporary Officer, if the Credentials of Foreign Ministers were addressed to him, they would have to be renewed as often as a new President was appointed, and serious prejudice to both Nations might result from the frequent interruption of Diplomatic intercourse.

The Letters of Credence set forth the name and special character of the Diplomatic Agent, and the general object of his Mission, and request that he may be received with favour, and have full faith given to what he says on behalf of his Sovereign. They are invariably sealed up, and were formerly secured with silken cord as well as with wax. The modern practice is to enclose the Letters in a sealed envelope. Their form varies with the usage of each Nation. They are for the most part in the form of a Cabinet Letter, (*Lettre de Cabinet,*) written in the first person and addressed by the Sovereign, who accredits the Minister, to the Sovereign to whom he is accredited, commencing with "My dear Brother" or "My dear Sister," and ending with an affectionate subscription and signature under the hand of the Sovereign. These Letters are sometimes styled *Lettres de Cachet*, being sealed up with the *Cachet* seal[41], which is the smallest seal of the Minister of Foreign Affairs. The Letters of Credence of some Sovereigns, as for instance of the Kings of Prussia and Denmark, are countersigned by the Minister of Foreign Affairs. It is not however the practice in Great Britain for the Minister of Foreign

[41] When they are enclosed in an envelope, the envelope is sealed up with the *Cachet* Seal.

Affairs to countersign Letters of Credence furnished to British Diplomatic Agents. In cases where a more formal ceremony is intended to be observed, the Letters of Credence are in the form of a *Lettre de Chancellerie*, which is drawn up in the third person, and in which all the titles of both Sovereigns or both States are set forth at length. A *Lettre de Chancellerie* is generally used when a Sovereign Prince accredits a Diplomatic Agent to a Republic or a Confederation of States, or when a Christian Power accredits a Public Minister to a Mahommedan Prince. Thus Great Britain accredits her Ministers to the United States of America, and to the Emperor of Morocco, in a *Lettre de Chancellerie*, whilst she accredits her Ambassador to the Emperor of Austria in a *Lettre de Cabinet*. The *Lettre de Chancellerie* is written upon a sheet of foolscap paper, and in the case of British Credentials, it bears upon its face the impression of the small signet of the Foreign Secretary stamped upon a wafer[42]. Great Britain has, of late, set examples to other States of simplifying, as much as possible, the Ceremonial of Credentials, but several of the great European Powers, Russia for instance, still continue to employ the *Lettre de Chancellerie* for the Credentials of her Diplomatic Agents of the three first Orders. In the case of a Diplomatic Agent of the fourth Order, his Letters of Credence are addressed by the Chief of the Department of Foreign Affairs in his own country to the Chief of the corresponding Department in the country to

[42] The British Foreign Secretary has three Seals, a small Cachet Seal for wax, used for *Lettres de Cabinet*, an intermediate seal for wafers, called the small Signet, for *Lettres de Chancellerie*, and a large seal for wafers, called the large Signet, for the Commissions of Secretaries of Embassy or Legation, and of Consuls.

which he is accredited. Where a Foreign Minister is accredited to an Emperor or a King, it is usual to furnish him with Letters of Credence of identical import, *mutatis mutandis*, addressed to the Consort of the King, if she has the title and rank of Empress or Queen[43]; but if he is accredited to a reigning Empress or Queen, it is not usual to furnish him with additional Letters of Credence addressed to the Prince Consort. It would appear to be the practice of some Governments to furnish their Public Ministers with *Letters of Recommendation* in addition to their *Letters of Credence*, addressed by the Sovereign himself, or by his Minister of Foreign Affairs, to distinguished public Functionaries, or to Members of the Government of the State to which the Ministers are accredited. Of this kind were the Letters of Recommendation, with which the Foreign Ministers, accredited by the Christian Powers of Europe to the Ottoman Porte, were formerly furnished, and which were addressed to the Grand Vizier and to the Reis Effendi, in other words to the Ottoman Prime Minister and to the Ottoman Secretary for Foreign Affairs. The practice of furnishing their Diplomatic Agents, who are accredited to the Porte, with Letters of Recommendation, is still observed by some of the European Powers, but Great Britain has discontinued them, and she furnishes her Ambassador to the Porte in the present day only with Letters of Credence,

Letters of Recommendation.

[43] In States where Morganatic marriages, or marriages of the Left Hand are recognised as lawful varieties of the matrimonial contract, the wife of the Emperor or King does not necessarily bear the title and rank of Empress or Queen, unless that title and rank have been directly conferred upon her. Thus Frederick IV. of Denmark, contracted a left-handed marriage with a noble Danish Lady during the lifetime of his first Queen, and upon the death of the Queen, the King elevated his left-handed wife to the dignity of Queen.

drawn up in the form of a *Lettre de Cabinet*, and addressed by the Sovereign in the first person to the Padichah. Great Britain, in so modifying her practice, has been careful to treat the Padichah of the Ottomans with the same degree of respect which she shows to the Emperor of all the Russias. The Padichah, on the other hand, accredits his Ambassador to Great Britain in a *Lettre de Chancellerie*, to which his Autograph Signature is subscribed, and upon which the mark of a Cachet seal is impressed in ink. It would thus appear that Reciprocity between Nations is not required in the ceremonial of accrediting their Diplomatic Agents. Each Nation has its own practice, and whenever a simplification of form has been adopted by any Nation, such simplification has been held not to imply any diminution of respect towards the Sovereign to whom the Letters of Credence are addressed.

The Letters of Credence are the document which the Public Minister presents upon his formal reception by the Sovereign to whom he is accredited, but he cannot require to be solemnly received for the purpose of presenting his Credentials before he has delivered an authentic copy of them to the Minister or Secretary of State for Foreign Affairs, in order that he may satisfy himself that they are fit and proper Letters for his Sovereign to receive. Letters of Credence addressed to a Sovereign Prince must be presented of Right to the Sovereign himself even during his minority, and although the Government of the State is entrusted to a Regent. Such was the practice in France during the minority of Louis XV. and the Regency of the Duke of Orleans, and such was in very recent time the practice observed in Spain[44]

[41] Ch. de Martens, Guide Diplomatique, Tom. I. § 18.

during the minority of Queen Maria Isabella and the Regency of the Duke of Vittoria. Letters of Credence expire upon the demise either of the Chief of the State by whom they were furnished, or of the Chief of the State to whom they are addressed. Fresh Letters of Credence must be presented, if a Public Minister be promoted by his Sovereign from a lower to a higher Order, as for instance, if he should be raised from the rank of Envoy Extraordinary and Minister Plenipotentiary to that of Ambassador.

Full Powers.

§ 213. Although the Letters of Credence, which are presented by a Diplomatic Agent accredited to reside at a Foreign Court, imply General Full Powers on his part to transact all political business on behalf of his Constituent, it is usual nevertheless, if any Special Treaty or Convention is to be negociated, to furnish the Diplomatic Agent with a Mandate or Instrument of Full Powers to negociate and conclude the particular Treaty or Convention. The Mandate (Mandatum Procuratorium), or, as it is commonly termed, the Full Powers (les pleins pouvoirs), are always set forth in Letters Patent of the Sovereign, which are signed and sealed according to the form which prevails in each State in regard to Letters Patent. The Full Powers granted by European Sovereigns are for the most part signed by the Sovereign, and countersigned by the Minister or Secretary of State for Foreign Affairs.

A Mandate of Full Powers may be a Mandate *ad hoc*, limited to the particular business of the negociation or treaty (pouvoirs spéciaux,) or it may be a Mandate to treat generally with the Ministers of all Powers and States within the dominion of the Sovereign to whom the Minister is accredited (pouvoirs

généraux), or it may extend still further, and may be a Mandate to treat with all Powers or States (pouvoirs illimités). Limited Full Powers are generally given to a Diplomatic Agent where the object of the negociation is a particular treaty with a particular Power. General Full Powers on the other hand are given, whenever there is a Congress of Ministers Plenipotentiary nominated by various States, and when it may be uncertain what Powers or States may take part in the Congress. Unlimited Full Powers are more rare, and are only given when it is uncertain not only what Powers and States may take part in a Congress, but where such Congress may be held or adjourned to, and what matters may come under discussion and negociation. Thus unlimited Full Powers were given by the Queen of England to the British Diplomatic Agents, who concluded the negociations on behalf of the British Crown at the Congress of Paris in 1856. M. de Garden[45] says correctly that such Full Powers are extremely rare. Publicists seem to speak of such Full Powers as not in use in the present day. Thus Ch. de Martens[46] says, "Il n'est plus d'usage de munir un Ministre du Plein Pouvoir, qui l'autorisait à traiter avec toutes les Puissances, et que l'on appelait 'actus ad omnes populos.'" Sir Robert Phillimore[47], on the other hand, construes this Latin phrase as equivalent to "Letters accrediting the bearer to all Courts." If this interpretation be correct, there is no doubt that such Letters of Credence are not in present use, but it seems doubtful from the instances cited by Ch. de Martens whether the Latin phrase is to be inter-

[45] Traité Complet de Diplomatie, T. II. p. 48.
[46] Guide Diplomatique, I. c. 4. § 19.
[47] Commentaries, XI. § 230.

preted in such a sense, inasmuch as Ch. de Martens alludes, in illustration of his remark upon the disuse of such Full Powers, to a Full Power granted by Queen Anne of England to her Secretary d'Ayrest, then British Resident at the Hague, whereby he was authorised to treat with the Ministers of all Princes and States interested in the negociations of the Peace of Utrecht[48]. Such a Full Power is evidently not more extensive than the Full Powers which are in use, when occasion requires them, in the present day, and which are quite distinct from Roving Letters of Credence. Thus Full Powers were given by the First Consul Napoleon to General Augereau to make peace with the Sovereign Princes of Germany, and to treat with the States of the Germanic Empire. By virtue of such Full Powers General Augereau entered into separate negociations and concluded separate Treaties with individual Princes and States of that Empire, according as he found any of them favourably disposed to his proposals of Alliance or of Neutrality[49].

Instructions.

§ 214. Every Diplomatic Agent is furnished by his own Government with Instructions as to the object of his Mission and for the guidance of his conduct. These Instructions are sometimes given orally, but more generally in writing, so that the Agent may be able to refer to them from time to time as occasion may require. The Instructions, being for his own guidance, ought to be kept secret by him, unless he is expressly authorised by his Government to communicate them in part, or *in extenso*. The duty of every Diplomatic Agent is to conform his conduct to his

[48] Lamberty, Mémoires, T. VIII. p. 742.

[49] Conventions entre la République Française et divers Princes d'Allemagne (14 Septre, 1800.) Martens, Recueil, VII. p. 112.

Instructions, unless it should happen from unforeseen circumstances, that a strict compliance with them would defeat the object of his Mission, or otherwise lead to consequences prejudicial to the interest of his Constituent. Under such circumstances it may become his duty to suspend the execution of his Instructions, or even to deviate from them, provided he does not engage his Government to any measure opposed to its general Policy or conflicting with the special object of the Negociations, with which he has been instructed. If questions should arise upon which a Public Minister is without Instructions, it is his duty to refer them to his Government, in other words to entertain all propositions or overtures *ad referendum*. If the case is urgent, and the time does not admit of referring to his Government for Instructions, it is his duty either to reject all overtures absolutely, or, if he entertains them, to accept them explicitly *sub spe rati*. This latter form, however, has now nearly passed out of use, since there is for the most part an express provision in every Treaty which is concluded by Diplomatic Agents, that the Ratifications of the Contracting Powers shall be exchanged within a certain number of days, it being thereby implied that the Treaty-Engagements do not acquire full force and effect, unless sanctioned by the Ratifications of the Parties upon whom the fulfilment of their provisions will devolve.

The practice of inserting in the body of a Treaty a provision as to Ratification has been adopted *ex majori cautela* to prevent any dispute as to the necessity of Ratification, as Publicists are by no means of accord on this subject. Grotius[50] and Puffendorf[51] hold, that

[50] De Jure B. et P., L. II. c. 11. § 12.

[51] Law of Nature and of Nations, L. III. c. 9. § 2.

the act of a Diplomatic Agent, if it is within the scope of his Full Powers, binds his Constituent absolutely upon the analogy of the Roman Law as to the Contract of *Mandatum*. Their doctrine is upheld by Vattel[52] and Klüber[53]. Bynkershoek[54], on the other hand, maintains that the Usage of Nations requires a Ratification from the Sovereign in order to give validity to a treaty concluded by his Minister in every instance, except in the very rare case where the entire Instructions are contained in Special Full Powers, and that the analogy of the Roman Law is not to be considered an unerring guide in this matter, as the Practice of Nations has intervened and has excepted International Compacts in this respect from the Rules of Civil Jurisprudence. The reason of this apparent anomaly of a Constituent not being bound by the act of a duly authorised Agent, will be more fully discussed in the next following chapter upon the Right of Treaties: it may be sufficient for the present moment to observe, that for the sake of the business itself of negociating successfully, it has become the Practice of Nations to give as extensive and general Full Powers as possible to Diplomatic Agents, even to the extent of a promise to ratify, in order that they may be able to do and to agree to all that their Constituents could do or agree to. The exercise, however, of these Powers is in practice understood to be regulated by Secret Instructions under the further control of Non-Ratification. The Non-Ratification of Preliminaries under the circumstances of such large

[52] Droit des Gens, L. II. c. 12. § 156.

[53] Droit des Gens, Partie II. T. II. § 142.

[54] Mandata illa Generalia, ut nunc sunt Gentium mores, nihil fere, ut dixi, præbent, quam potestatem agendi, minime vero agendi ex arbitrio contra ipsa Principis mandata secretiora. Quæst. Jur. Publici, L. II. c. 7.

Powers is not considered to involve any breach of the Law of Nations.

§ 215. The Ceremonial to be observed in the reception of a Foreign Minister at the Court to which he is accredited has undergone great modifications within recent times. It was one of the regulations which were adopted by the Congress of Vienna, (anno 1815,) that an uniform mode of reception for Diplomatic Agents of each class should be established in each State; and although this provision has not been literally carried into execution, the practice of Nations has conformed itself to the spirit of it. Whatever be the rank or class of a Public Minister, it is his first duty to notify his arrival immediately to the Minister or Secretary of State for Foreign Affairs of the Sovereign to whom he is accredited. In the case of an Ambassador, as distinguished from a Diplomatic Agent of the Second Class, it was formerly the practice for him to make a *Solemn Entry* into the city, which was the residence of the Sovereign or the seat of his Government. This ceremony may now be regarded as fallen into general desuetude, as far as regards the mutual intercourse of the Christian Powers of Europe. The *Solemn Entry* was part of the pageant, which terminated in a *Public Audience*, in which the Ambassador presented his Letters of Credence to the Sovereign in person. Ambassadors, as distinguished from Ministers of the Second Class, have always been entitled to demand a *Public Audience* of the Sovereign, but the *Solemn Entry* appears to have been a Ceremony which was within the discretion of the Sovereign, who receives the Embassy, to accord or not at his pleasure; and we find accordingly, that both the Holy See and the Ottoman Porte had special rules of practice, under which the Solemn Entry

Ceremonial of Reception.

was granted only to the Ambassadors of particular Nations.

With regard to the Public Audience, which is granted to Ambassadors and Nuncios on their arrival, and sometimes on their departure, the same Ceremony is observed to all alike. The Introducer of Ambassadors, or the Master of the Ceremonies, proceeds in a State carriage of the Sovereign drawn by six horses to the Hotel of the Ambassador, and conveys him to the Palace of the Sovereign, where he is received in the presence of the great Officers of the Court, with the same honours which would be paid to the Sovereign, if present, whom he represents. The Ambassador then reads a Speech of Audience in which he refers to his Letters of Credence, which he thereupon takes from the hands of his Secretary of Embassy, who attends him on such occasions, and presents to the Sovereign, who hands them to the Minister or Secretary of State for Foreign Affairs. The Sovereign then reads an answer to the speech of the Ambassador, who thereupon retires from the presence of the Sovereign with the same forms with which he entered the Presence-Chamber. The Ceremony of a Public Audience has of late been frequently dispensed with at the Court of St. James' on occasions of the reception of an Ambassador from an European Sovereign, and on such occasions a Private Audience has been substituted of a similar kind to that which is accorded to a Foreign Minister of the second or third class. Such an audience, however, is not altogether free from Ceremony. The Sovereign receives the Ambassador in the presence of the Minister or Secretary of State for Foreign Affairs, and the Introducer of Ambassadors or the Master of the Ceremonies attends to present in due form the Ambassador, who

makes a short speech explanatory of his Mission, and having presented his Letters of Credence to the Sovereign, retires.

The Sacred Character of an Ambassador.

§ 216. It being necessary that Nations should treat and hold intercourse with one another in order to adjust disputes and maintain relations of amity, and it being impossible for a Nation collectively to treat with another Nation, there results a necessity for Nations to delegate Agents on their behalf, and to furnish them with full Powers to negociate and settle the matters which may be at issue. The Right of Embassy being thus established, the inviolability of the person of the Ambassador is a necessary consequence; for if the person of the Ambassador is not secure from violence of every kind, the Right of Embassy becomes precarious and the channels of International Reconciliation will be closed. Vattel[55] accordingly derives the independence and inviolability of the Ambassadorial character from the *Natural* and *Necessary* principles of the Law of Nations. This attribute of inviolability is so absolute, that the person of an Ambassador is held to be *sacred*. "Sanctum inter gentes jus legationum, sancta corpora legatorum[56]." Bynkershoek[57] accounts for the peculiar sacredness of the person of the Ambassador on the ground that an Ambassador represents his Sovereign, and that he is the Minister of peace and alliance, and that without his agency the Society and Repose of Nations could not be maintained.

His Exterritoriality.

§ 217. The inviolability of the person of an Ambassador entails, as a necessary incident, his entire exemption from the Territorial Jurisdiction of the Sove-

[55] Droit des Gens, L. VII. § 81, 103. Klüber, § 103. Hefter, § 205.

[56] Grotius, De Jure Belli et Pacis, L. I. c. 18. § 1.

[57] De Foro Legatorum, c. 5.

reign to whom he is accredited. This exemption, which applies to the civil as well as the criminal law of the Territory, is founded upon considerations not of mere convenience but of necessity; for an Ambassador ought to be protected from every kind of compulsion, as well from that which relates to things necessary to him, as from that which touches his person, in order that his security may be complete [58]. The fiction of Ex-territoriality has been accordingly introduced with a view to express in the most forcible manner the completeness of this exemption. According to this fiction the Public Minister, although *de facto* resident in a foreign country, is regarded as *de jure* resident within the territory of the Nation which he represents, and he continues to be subject to the Laws of his own country in all matters which concern his Personal *Status* and Property [59].

The Right of Personal Inviolability attaches to a Public Minister from the time when he enters the territory of the State to which he is accredited, if notice of his Mission has been previously communicated to it, to the time when he quits the territory, although war should have actually broken out between his own Nation and the State to which he is accredited before he has taken his departure. The Ottoman Porte in this respect has conformed its prac-

[58] Nam omnis coactio abesse a legato debet, tam quæ res ei necessarias, quam quæ personam tangit, quo plena ei sit securitas. Grotius, De Jure Belli et Pacis, L. II. c. 18. § 9.

[59] Quare omnino ita censeo, placuisse gentibus ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subjicit, exceptionem pateretur in legatis, ut qui sicut fictione quadam habentur pro personis mittentium, ita etiam fictione simili constituerentur quasi extra territorium; unde et civili jure populi, apud quem vivunt, non tenentur. Grotius, De Jure Belli et Pacis, L. II. c. 18. § 4, 5.

tice to that of the Christian Powers of Europe. It was formerly the rule of the Porte, if war broke out between it and a Christian Power, to imprison the Diplomatic Agent of that Power in the Castle called the Seven Towers, until peace was reestablished. The Porte first waived this practice when the war broke out with Russia, which was terminated by the peace of Bucharest (28 May, 1812). In the course of the conferences which preceded the departure of the Ambassadors of France, Great Britain and Russia, in the year 1827, the Porte formally declared to the Ministers of Austria and Prussia that the Seven Towers no longer existed[60].

Ex-territoriality of the Ambassador's Hotel, and of his Suite.

§ 218. The same reasons which warrant the Independence and Personal Inviolability of an Ambassador, concur likewise in securing the sanctity of his abode. The general consent of Nations has accordingly extended in practice the fiction of *Ex-territoriality* to the Hotel of the Ambassador; which is not merely protected by the positive Law of Nations from all lawless outrage, but is inaccessible to the ordinary officers of Justice or of Revenue[61]. The Ex-territoriality of the Ambassador's Hotel is however not so absolute as to constitute it an asylum for others than those, who form the suite of the Ambassador himself. Bynkershoek[62] has discussed the Right of Asylum for all who take refuge in the Hotel of an Ambassador, which Grotius[63] has pronounced to be a privilege depending upon the concession of the State wherein the Ambassador resides, and not to be a part of the Law of Nations; and Bynkershoek has correctly pointed out, that all the privileges of Am-

[60] Ch. de Martens, Guide Diplomatique, § 23.

[61] Vattel, Droit des Gens, L. IV. c. 9. § 117.

[62] Bynkershoek, De Foro Legatorum, c. 21.

[63] Grotius, De Jure Belli et Pacis, L. II. c. 18. § 8.

bassadors have one and the same object in view; namely, to enable them to discharge the duties of their office without impediment or restraint; and that it is not necessary for the discharge of their duties that they should afford shelter from justice to third parties, who are not connected with the end and objects of the Mission. The limits, within which an Ambassador may claim the privilege of Ex-territoriality, in regard to his own *Personal Suite*, are within the discretion of the Ambassador, the privilege in regard to his own Personal Suite being granted for the convenience of the Ambassador himself; but an Ambassador cannot waive, at his discretion, the privilege of Ex-territoriality in regard to any members of his *Official Suite;* that is, of any officer of his Household appointed by the Sovereign himself. The Chief of the State alone may waive the privilege of Ex-territoriality on behalf of the Ambassador and the *personnel* of the Embassy. It is not even competent for any of these individuals to waive at their own pleasure this privilege[64], for it is not their personal privilege, but the privilege of the Independent State or Nation which they represent. Difficulties have occasionally arisen, from persons claiming without sufficient warranty, to belong to the Suite of a Foreign Minister, and the usage of most Nations now requires, that an official list of all the members of the Suite of a Foreign Minister shall be transmitted to the Minister or Secretary of State for Foreign Affairs at fixed periods[65].

The Ambassador's Jurisdic-

§ 219. It follows from the principle of Ex-territoriality, that a Foreign Minister is at liberty to exer-

[64] Vattel, L. IV. c. 8. § 3. Bynkershoek, De Foro Legatorum, c. 23.

[65] Wheaton's Elements, Part III. c. 1. § 16. Phillimore's Commentaries, T. II. § 188.

cise Criminal and Civil jurisdiction over the *personnel* of the Embassy, if he be so empowered by his own Nation. It rests accordingly with the discretion of the Sovereign Power, which accredits an Ambassador, to invest him with such Jurisdiction. It is customary in Civil matters for a Foreign Minister to be invested with, and to exercise, jurisdiction in all questions which may arise amongst the members of his *Official Suite*, or between them and the citizens or subjects of the country to which he is accredited; but it is not the usage for him to exercise jurisdiction in criminal matters, over any person officially attached to the Embassy further than by arresting the offender and sending him for trial back to his own country. In the case of his own *Personal Suite*, a Foreign Minister may, if he pleases, upon complaint made to him, dismiss any individual from his service, and so withdraw from him the protection to which he would be entitled under the Law of Nations, if he continued in his service.

tion over the *personnel* of the Embassy.

§ 220. There are some exceptions to the privilege of Ex-territoriality as applied to the Hotel of an Ambassador. A Foreign Minister is privileged from being called upon to contribute personally to the General Taxes of a Country; that is, to such Taxes as are levied by the Government, and which are available for the General purposes of the State, in which the Ambassador is not interested. But a Foreign Minister is not exempt from the payment of Local dues, which are raised for purposes of Local administration, and which are expended on Local objects, from which he himself, in common with his neighbours, derives immediate benefit. Thus he is liable to pay the Local Rates[66] assessed upon his

Liability of an Ambassador to the payment of Local dues.

[66] This liability has been sometimes disputed, and Klüber holds

Hotel, or its site, for sewerage, lighting, watching, and similar objects[67]. He is also liable to pay tolls for the use of roads and bridges, and also for the carriage of his letters, if they are conveyed to him by the Local Post; and as he is at liberty at all times, if he pleases, to send his letters by a privileged Courier, it is therefore optional for him to employ the services of the Local Post, and if he employs it, he derives immediate advantage therefrom[68].

Liberty of Religious Worship.

§ 221. Another and more important exception to the privilege of Ex-territoriality, is found in the exercise of Religious Worship (Culte Religieux) in the Hotel of an Ambassador. A Foreign Minister has not the right of maintaining a Chapel and a Chaplain within his Hotel, under the Common Law of Nations[69]; and accordingly, we find the liberty of Religious Worship for the Ambassador and his Suite, made a matter of Treaty-engagement between the

it to be doubtful, whether such Rates can be rightfully exacted, if the Ambassador is unwilling to pay them. Wheaton considers the Ambassador's Hotel to be subject to taxation, in common with the other Real Property of the Country. A practical difficulty will always be found in levying them, as the Person and Property of the Ambassador is exempt from the Jurisdiction of the Civil Tribunals, which must be appealed to in order to enforce payment in the last resort.

[67] No uniform rule can be said to exist on this subject, as the circumstances under which water and light are supplied to the Ambassador's Hotel may vary in different countries, but the tendency in the present day is to uphold the liability of a Foreign Envoy to pay Local dues, from which he and the inhabitants of his Hotel derive immediate benefit. Such is the practice in Germany, whilst in Sweden a Foreign Envoy is exempt from every kind of tax, but then the supply of water and light to his hotel is a matter of private contract. In the case of some of the parishes in Westminster there are private Acts of Parliament under which the proprietor of a house, which is leased to a Foreign Envoy, is made personally liable to pay the local Rates.

[68] Ch. de Martens, Guide Diplomatique, § 109.

[69] Martens, Précis, § 222.

Roman Catholic and Protestant Powers of Europe, subsequently to the Reformation; and between the Christian and Mahommedan Powers at all times since Diplomatic intercourse was established between them. There are some countries in which, under the Territorial Law, all forms of Religious Worship are permitted, in which case no Treaties are required: there are others, in which one form of Religious Worship is established, and none other is tolerated. In such cases it has been usual to stipulate by Treaty for the free exercise of Religious Worship, on behalf of the members of the Embassy and the Suite of the Ambassador within the Hotel of the Embassy. It has been an invariable rule to concede this privilege, whenever there has been no public place of Religious Worship at the seat of the Embassy, which its members could attend, as being in accordance with their Religious Creed; or wherever there has not been within the Hotel of another Ambassador accredited to the same Court a Chapel, in which such Religious Worship has been already permitted. Thus, as soon as the Emperor Joseph II had granted liberty of Religious Worship to the Protestants of the Confession of Augsburg resident in Vienna, he insisted upon the discontinuance of Religious Worship in the Chapels of the Legations of the Protestant Princes of the Germanic Empire[70]. Grotius is altogether silent on this subject, but his silence has not any significance, seeing that in his day a Resident Embassy (Assidua Legatio) was altogether a novelty, and it had not any warrant of ancient Custom[71]. At the time, however, when Vattel wrote his work on the Law of

[70] Klüber, Droit des Gens, § 215. Ch. de Martens, Guide Diplomatique, § 35.

[71] Grotius, De Jure Belli et Pacis, L. II. c. 18. § 3, 2.

Nations, the free exercise of Religion was a privilege allowed to a Foreign Minister in almost every country. Vattel speaks of it as resting on established Custom[72]. "It is indeed highly proper," he says, "that a Minister, and especially a Resident Minister, should enjoy the free exercise of his Religion within his own house, for himself and his *Suite*. But it cannot be said that this Right, like those of Independence and Inviolability, is absolutely necessary for the success of his Mission, particularly in the case of a temporary Minister, the only one whom Nations are bound to admit. The Minister may in this respect do what he pleases in his own house, into which nobody has a right to pry or to enter. But if the Sovereign of the Country, where he resides, should for substantial reasons refuse him permission to practise his Religion in any manner which might render it an object of Public notice, we must not presume to condemn the conduct of that Sovereign, much less to accuse him of violating the Law of Nations. Ambassadors are not debarred at present from the free exercise of their Religion in any civilised country; for a privilege, which is founded on Reason, cannot be refused when it is not attended with any evil consequences." The practice of nations since the time of Vattel has become still more courteous[73], and has gradually extended the privilege of Religious Worship to the establishment of public Chapels, attached to the several foreign Embassies; so that although the privilege of a Chapel within the Hotel of the Ambassador is a matter of Comity, and not of strict Right, still the custom of permitting it has become so uni-

[72] Vattel, Droit des Gens, L. IV. § 104.

[73] Ch. de Martens, Guide Diplomatique, § 35. Wheaton's Elements, Part III. c. 1. § 21.

versal, that to refuse such permission in the present day would be little less discourteous, than to refuse to permit the continuous Residence of the Ambassador himself. The privilege of a Chapel, however, does not extend to the use of bells, or to any public processions or ceremonies outside the walls of the Chapel.

Inviolability of an Ambassador passing through the territory of a third Power.

§ 222. Jurists are divided in opinion upon the question whether an Ambassador is by the Law of Nations entitled of Right to Safe Conduct whilst passing through the territory of a third Power, on his way to or from the territory of the Nation to which he is accredited. Grotius[74] does not expressly determine this question, when he says, that "the law respecting the Inviolability of Ambassadors is to be understood as binding upon the Nation to whom the Embassy is sent, more particularly if it has received the Embassy, as from that time a tacit Compact may be considered to have been introduced." Bynkershoek, on the other hand, holds in terms, that the privilege of the Ambassadorial Character is only operative within the State to which he is accredited, and he cites in support of his view the opinions of Gentilis, Zouch, Huber, and Wicquefort. Bynkershoek[75] admits however that the opinions of the more ancient writers upon the Rights of Ambassadors were in a contrary sense. Vattel, on the other hand, draws a distinction between the enjoyment of all the Rights annexed to the Diplomatic Character, and the enjoyment of Personal Inviolability. It must be borne in mind, that many of the Rights now recognised as incident to the Right of Embassy, have only been so recognised, since the practice of accrediting Resident Ambassadors has given occasion

[74] Grotius, De Jure Belli et Pacis, L. II. c. 18. § 5.

[75] Bynkershoek, De Foro Legatorum, c. 9. § 7.

for their recognition. "It is true," says Vattel[76], "that the Prince alone to whom the Minister is sent is obliged and specially engaged to secure to him the enjoyment of all the Rights attached to his Character; but the others, over whose territory he passes, cannot refuse to him that to which the Minister of a Sovereign is entitled, and which Nations owe reciprocally to one another. They owe to him above all things perfect Personal Security. To insult him would be to injure his Master and the whole Nation to which he belongs: to arrest him and offer violence to him would be to impair the Right of Embassy, which appertains to all Sovereigns." Merlin[77], Klüber[78], Ch. de Martens[79] and Wheaton[80], support Vattel's opinion, and Merlin disputes with good reason the interpretation, which Bynkershoek has assigned to the word *passerende*, which occurs in an Edict of the States General (anno 1679) issued on the occasion of the Negociations for the peace of Nimeguen. The Edict announced that the persons, domestics, and effects of foreign Ambassadors or Ministers, "*hier te lande komende, residerende, of passerende*," should be exempted from arrest. Bynkershoek considers this Edict as having reference only to foreign Ministers accredited to the States General, and construes the word *passerende* as referring not to those who might have landed in the territory of the States General, and were *passing through* it on their way to the territory of a third Power, but to those who were about to leave the territory of the States General, having been accredited to them as Resident Ministers. "Non

[76] Droit des Gens, L. IV. c. 8. § 84.
[77] Répertoire, tit. Ministre Publique, Sect. V. § 3.
[78] Droit des Gens, 204.
[79] Guide Diplomatique, § 36.
[80] Elements, Part III. § 20.

interpretor," are his words, "de legatis transeuntibus, sed abeuntibus." Merlin in reviewing Bynkershoek's interpretation maintains, that *passerende*, being the Dutch equivalent of the French word *passer*, is applicable only to a person who, having arrived at a place, proceeds onward to another place, and is never used to designate a person who is leaving a place where he has been residing, and going back to the place from which he first came. Merlin however very justly remarks, that when it is said that an Ambassador is entitled to have his Independence respected in every territory through which he passes, it must be understood that he travels under the avowed character of an Ambassador; in other words, that his passport certifies his Public Character. If an Ambassador, who is *in itinere*, presents such a passport at the frontier of a State other than that to which he is accredited, and is thereupon allowed to enter its territory, the good faith of the Sovereign of that State becomes pledged to respect his Official Character, as long as he does nothing inconsistent with perfect good faith on his own part. A Nation is at liberty to refuse a passage through its territory to a foreign Minister accredited to a third Power, precisely as a Nation is entitled to refuse altogether to receive a foreign Minister accredited to itself, but, if it allows him upon knowledge of his Character to enter its territory, it may not maltreat him nor suffer any violence to be offered to his Person.

The reasons assigned by Bynkershoek for restricting the privilege of the Ambassadorial Character are thus stated, "quia illa privilegia voluntatis tacitæ sunt post admissum legatum, et legatum etiam repellere licet, neque legatio inter alios, quam qui misit et ad quem mittitur, versatur." On examining these

reasons, it will be found that the principle involved in the first reason does not militate against Vattel's view, if the Ambassador travels with a passport which certifies his Official Character, as every State, through whose territory he proposes to pass, is at liberty to decline to admit him in such Character, and his admission is thus a Voluntary act upon its part; on the other hand, the second reason, whilst it may be a valid reason so far as Resident Embassies and the secondary rights of Embassy incidental to Residence are concerned, is inconsistent with the fact that the person of the Courier who is the bearer of the despatches of a Foreign Minister is sacred under the Law of Nations, whilst he is passing through the territory of a Power to whom the Minister is not accredited, if the Official Character of the Courier is certified by his passport. The Right of Innocent Passage, in regard to an Ambassador on his way to the Court to which he is accredited, is a Right in which all Nations are interested. It may be said of the disputes of Nations as of individuals, "Rei Publicæ interest ut finis sit litium." It is in the common interest of Nations that the peace of the World should be maintained, and the Personal Inviolability of the Ambassador, whose Mission is essentially that of Peace, is as necessary for that end, when he is passing on his way to his destination, as when he has reached his post. Vattel[81] holds that Francis I of France was justified not merely in declaring war against the Emperor Charles V, by reason of the murder of his Ambassadors, accredited respectively to Constantinople and to Venice, whilst passing through the Duchy of Milan, but in calling in the aid of other Nations, since it was not a Private Right of a particular Nation which was in

[81] Droit des Gens, L. IV. c. 7. § 84.

dispute, but a matter which involved the Right of all Nations, since they are all interested in maintaining the Sacred Right of Embassy and of those means which enable them to hold communication with each other and to treat of their Commercial interests [82]. Wheaton, who, as already observed, supports the views of Vattel and Merlin, remarks, that the Inviolability of a public Minister in his passage through the territory of a third Power depends upon the same principle which protects the person of his Sovereign coming into the territory of a friendly State by the permission, express or implied, of the local Government. Both are equally entitled to the protection of that Government against every act of violence and every species of restraint inconsistent with their Sacred Character [83].

[82] The cases of the Duc de Belle Isle, Ambassador of France to Prussia, arrested in Hanover on his way to Berlin, and of the Marquis de Monti, Ambassador from France to Poland, arrested in Dantzig on his way back to France, which are sometimes quoted as examples of the practice of Nations in accordance with Bynkershoek's view, will be found on examination to be instances of enforcing a strict Right of War. The details of each case will be found in the collection of Causes Célèbres du droit des Gens, par Ch. de Martens, Tom. I. pp. 210, 285.

[83] To the two cases above mentioned may be added that of the Earl of Elgin, Ambassador from Great Britain to the Ottoman Porte, who was arrested in his lodgings at the Hôtel de Richelieu in Paris by order of the First Consul in 1803, immediately upon the rupture of the Peace of Amiens. Lord Elgin was on his way home from Constantinople at the time of his arrest, and was not released until the end of the war. This was an extreme instance of the exercise of the *summum jus* of a belligerent, inasmuch as Lord Elgin had furnished passports to all the French prisoners in Turkey during the campaign of Egypt in 1801, and they had reached France unmolested by the British cruizers solely in virtue of Lord Elgin's passports. For the general history of the arrest and detention of British subjects on this occasion, see the author's volume on the Rights and Duties of Nations in Time of War, 2nd edition, Oxford and London, 1875, p. 95. The First Consul offered to exchange Lord Elgin for a French General Officer, but the British Govern-

"We have used," says Wheaton, "the term *permission, express or implied*, because the public minister of a Sovereign Prince accredited to one country, who enters the territory of another country making known his Official Character in the usual manner, is as much entitled to avail himself of the permission, which is implied by the absence of any prohibition, as the Sovereign himself in a similar case[84]."

Consuls not Diplomatic Agents.

§ 223. The Institution of Public Consulates in Foreign Countries (Consulats à l'Etranger) dates from the Sixteenth Century, although the name of *Consul*, as applied to an Officer exercising jurisdiction in Commercial matters, was in familiar use in the cities of the Mediterranean and in the Hanse Towns since the Thirteenth Century[85]. The Judge-Consul was originally a local Officer annually elected in each great City of Maritime Commerce by the members of the Mercantile Community established therein. It was his province to determine all disputes between the members of that Community and foreign merchants in matters of Commerce and Navigation. These Officers were for the most part two in number, and the *Consolato del Mare*, one of the earliest compilations of Rules for the decision of Maritime and Commercial questions, is considered to have been so called, as embodying the Rules according to which the Judge-Consuls, established in the Maritime Cities of Spain, proceeded in determining the questions submitted to their decision. As Commerce increased, these Local

ment did not consider such an exchange to be admissible. It would have been in fact an unequal exchange, and under the circumstances of hostilities being recommenced a diplomatist's pen was not an equivalent for a general officer's sword.

[84] Elements, Pt. III. § 20. Bynkershoek, De Foro Legatorum, c. 3, 9.

[85] The office of Judge-Consul was first introduced at Barcelona in Spain in the year 1279.

Institutions became inadequate to the wants of Merchants of different Nationalities, and we thus find the Institution of Judge-Consuls fall into disuse, and their functions pass into the hands of Officers bearing indeed the name of Consuls, but appointed not by the resident body of merchants in each City, but by Foreign States, and commissioned by them to watch over the Commercial interests of their subjects. The duties of a Consul in the modern sense of the word are strictly limited to the management of the private affairs of the subjects or citizens of the State, from which he has received his Commission. He is not concerned in any way, as Consul, with the public affairs of States, and he is accordingly not clothed with a Diplomatic Character. J. J. Moser is almost the only Jurist of note who has claimed for the Consul a place of inferior rank amongst Public Ministers; but Bynkershoek, Wicquefort, Vattel, and Klüber concur in rejecting such a claim. It is true, that European Consuls accredited to Mahommedan Powers have in fact exercised many of the functions which mark the Diplomatic Agent, and have been clothed with many of the attributes of the Diplomatic Character; but the *Status* of the Consul in the Levant, as well as in China and in Japan, is exceptional, and rests upon special Treaty-engagements between the Christian and the Mahommedan or Buddhist Powers [86]. A Consul is not the bearer of Letters of Credence, but he receives a Commission (lettre de provision) signed by the Sovereign authorising him to discharge the duties of Consul in the place where he is to reside: his nomination is not addressed to the Chief of the State, but his appointment is com-

[86] The special jurisdiction which Consuls exercise in the Ottoman Empire is treated of in a subsequent chapter.

municated to the Government, and its permission is required to enable him to enter upon his functions. The permission is given by a Rescript or Order from the Foreign Department of the State, to which the Consul is accredited, termed an *Exequatur*, the form of which varies in different countries, but the purport of which is to authorise the functionaries of the Home as distinguished from the Foreign Department of the Government to recognise the Official Character of the Consul[87]. The Consul cannot enter upon his functions before the delivery of the *Exequatur*, which may be revoked at any time at the discretion of the Government of the Country, wherein he is established. It was not unusual in the case of the Free Cities of the Germanic Confederation, and the practice is still maintained in Mahommedan Countries and in several of the South American Republics, that Consuls or Consuls-General should also be accredited as Agents for Political purposes, or as Chargés d'Affaires. Under such circumstances they are invested with the Diplomatic Character, and are entitled to the privileges of Public Ministers. It is conformable to the principles of Public Law that the Consul, who is also Chargé d'Affaires, should not engage personally in trade. In the case of ordinary Consuls some Nations forbid and others allow their Consuls to trade. A Consul, who is engaged in trade, is amenable in all that regards his trade to the Local Jurisdiction equally as any private merchant, and although he may be a natural-born subject of the State whose Commission he bears, he will notwithstanding his Commission of Consul, acquire by con-

[87] There are various grades in the Consular department, such as Consul-General, Consul, Vice-Consul, Consular Agent, and Pro-Consul.

tinuous residence and trade a Commercial Domicil in the Country, in which he maintains his trading Establishment, and his property may thus in case of war be liable to be treated as the property of an Enemy by any Power, which is at war with the Country in which he carries on his trade.

CHAPTER XIII.

RIGHT OF TREATY.

Sacred character of Leagues between Nations—Leagues may be in confirmation or in extension of Natural Right—Religious obligation of every League—Equal and Unequal Leagues—Unequal Leagues not contrary to Equity—Personal and Real Leagues—Tests of Continuing Leagues—The Holy Alliance of 1815 a strictly personal League—History of the Holy Alliance—The Family Compact of the House of Bourbon—Treaties of Navigation and Commerce—Treaties of Jurisdiction—Treaties of Extradition—Civil law of the Romans as to fugitives from Justice—Common Law of Nations—Extradition of fugitive slaves and of deserters a frequent subject of Treaty-engagement—Extradition of political offenders exceptional—Treaties of Boundary—Judicial Decisions as to the permanence of certain Treaty-Engagements—Treaties which create a Servitude of Public Law—Treaties of Equal and Unequal Alliance—Treaties of Protection—Treaties of Subsidy—Treaties of Guaranty—Treaties of Neutrality—Conclusion and Ratification of Treaties—Termination and Renewal of Treaties.

The sacred character of Leagues between Nations.

§ 224. It has been observed in discussing the International Relations which existed between the Christian Powers of Europe and the Ottoman Porte at the conclusion of the Eighteenth Century, (§ 61,) that it was a maxim of the Mahommedan world, that there was no other Law of Nations than that which is derived from Positive Compact or Convention. Such also seems to have been the condition of things contemplated by the Roman Jurists, when they admitted the possible existence of an intermediate state between amity and hostility, in which the members of one Nation might stand in relation to the members of another Nation, when there was no League between the Nations themselves. It appears to have been a

maxim of the Roman Law[1] in reference to such Nations, that although they were not to be regarded by the Romans as Enemies, yet if any thing should find its way out of Roman territory into their country, it would become their property, and if a Roman citizen should be captured by them, he would become their slave, whilst Roman citizens would be entitled to exercise analogous control over persons and things appertaining to such Nations, and happening to come within Roman territory. A doctrine of similar import was upheld amongst the ancient Greeks, and the practice of Statesmen in such matters found countenance in the writings of Philosophers. If we travel back to a period still more remote, we find that amongst the Jews of olden time it was denied that any satisfaction was to be made to an injured party who was a foreigner, unless his Nation was a Confederate of the Jewish Nation. There might however be Communities beyond the pale of the *Race* in the case of the Jew and the Greek, and beyond the precincts of the *Asylum* in the case of the Romans, towards whom Religion would enjoin the performance of the most friendly acts, if Public Covenants to that effect had been made with them, and when such Covenants had been made by the Sovereign Power in behalf of the Nation, the whole Nation was considered to be exposed to the wrath of the Deity, if any individual violated them in any respect. It thus became a matter of the last importance to Nations to reduce into a system the making of Public Covenants or

[1] Pomponius apud Dig. XLIX. Tit. XV. §. 5. Nam si cum gente aliqua neque amicitiam, neque hospitium, neque fœdus amicitiæ causa factum, hi hostes quidem non sunt; quod autem ex nostro ad eos venit illorum fit, et liber homo noster ab eis captus servus fit eorum. Idemque est, si ab illis ad nos aliquis pervenerit.

Leagues, and the observance of the obligations of Law resulting therefrom. The Roman Nation from its peculiar origin, being founded on the Right of Sanctuary, seems to have felt an instinctive want of more definite institutions for this object than any which we discover amongst the Greek Races, and we find accordingly a religious Corporation established in Rome at a very early period, the Collegium Fetialium, whose special business it was to determine the conditions and to regulate the forms under which the Roman People could denounce Treaties and declare War without incurring the anger of the Gods.

Leagues may be in confirmation or in extension of Natural Right.

§ 225. Grotius[2] has adopted a twofold division of Leagues, arising from the matter thereof, namely, those which require such things only as are agreeable to the Law of Nature, and those which add something more thereunto. Puffendorf[3], whilst he approves the principle of this division, subdivides the latter class, and thereby virtually adds a third class, namely, those which restrain the duties of Natural Law, when they are too general and indefinite, to certain and particular articles. "Leagues," says Grotius, "of the first kind are generally made between enemies upon the conclusion of a war, and formerly were often made, and indeed were in a certain manner necessary, between those who had never contracted any engagement towards one another; which arose from this circumstance, that the Rule of Natural Right, which maintains that there is a kind of Natural Relationship between all mankind, and therefore that it is wrong for one man to harm another, had become effaced by evil habits, as of old before the Deluge, so likewise some time after the Deluge, so that it was accounted

[2] De Jure B. et P., L. II. c. 15. § 5.

[3] Law of Nature and of Nations, L. VIII. c. 9. § 1.

lawful to rob and plunder Strangers, without declaring war [4]. So inveterate indeed was the corruption of manners amongst the Greeks, that Aristotle, the Philosopher of Practical Life, maintained that hunting, as a branch of warfare, was a Natural habit of mankind, as respects wild beasts and such individuals of the human race, as, being intended by nature to be in a subject state, refuse to submit themselves [5].

Religious obligation of every League.

§ 226. A League in its simplest form was but the extension of the Religious Obligation, under which Fellow-Citizens stood towards one another, as votaries of the same Gods. It was the formal recognition on the part of two Nations of a reciprocity of Duty and Right under a common Sanction. Thus the Amphictyonic Confederation was a League of States, in which the Religious character was paramount, all the members of the League being votaries of Apollo, and making offerings to that Deity in common at the Delphic Shrine.

The *Civitas* or *Nation* was in its earliest form a body of persons making sacrifices to the same Deities. The *Stranger* was beyond the pale of the common Religion of the *Civitas*. There was accordingly no obligation upon the members of a State in respect of a Stranger, as such, corresponding to the obligations which existed amongst Fellow-Citizens, who could appeal in the last resort to a Divine Sanction, which was acknowledged by all alike. The League, however, admitted the Stranger within the pale of Religion,

[4] Thucydides describes in like terms the manners of the early Greeks, L. I. c. 5. Servius, in his Commentary upon the eighth and tenth Æneid, speaks in similar language of the Tyrrhenians; Diodorus Siculus, L. V. c. 34, reports the same of the Iberians, and Cæsar de B. Gall., L. VI. c. 23, says of the Germans, Latrocinia nullam habent infamiam, quæ extra fines cujusvis civitatis fiunt.

[5] Politica, L. I. § 3.

and the ceremony of his admission was the offering of a common sacrifice to the Deity. Hence we find amongst the Greeks that the simplest form of League was denoted by the term σπονδὴ, which signifies a common libation poured out to the Gods, and which had a symbolic character, seeing that the Contracting Parties mixed wine together as an emblem of concord, and then poured it forth in common with a prayer, that whoever should first break the compact might have his blood poured forth in like manner [6]. The conclusion of a League between two Nations constituted a State of amity between them, which put an end to that vague condition, which Sallust [7] describes, when he speaks of King Bocchus as "nobis neque bello, neque pace cognitus."

Under the simplest head of Leagues may be classed all Compacts between Nations for freedom of Commerce and for Hospitality towards Strangers of either Nationality, as being agreeable to the Law of Nature. A Nation may enter freely into Leagues of this kind with every Nation, as the duties involved in them cannot conflict with one another, any more than the duties of Natural Law. "No person," says the Advocate of King Perseus before the Achæan Assembly, "seeks to induce you to enter into any new Alliance, which will embarrass us, but only into an agreement, which will secure to each party freedom of Commerce and reciprocity of Right. Such an agreement will not be inconsistent with our Alliance with the Romans."

Unequal and Equal Leagues.

§ 227. Leagues, which add something to the Natural Law of Nations, are divided by Grotius into Equal and Unequal Leagues. Puffendorf adopts the

[6] Homer, Il. III. 300.
[7] Sallust, de Bello Jugurthino, c. 22.

same classification. The first are such as are concluded on equal terms, when not only the engagements themselves are equal on both sides, either absolutely or in proportion to the strength of either party, but also when neither party is by such engagements rendered in any way dependent upon the other. Unequal Leagues are of two kinds, according as the inequality regards the stronger or the weaker party. The stronger party may undertake to give assistance without requiring it in return, or to perform more in proportion than the weaker State is required to do, or the weaker State may submit to conditions which limit the exercise of its Natural Right of independence. For instance, a Nation may undertake to account the friends and enemies of another Nation as its own friends and enemies, or not to fortify particular parts of its own territory, or not to keep on foot more than a certain number of trained soldiers or war-ships, without being shorn of its Independence in any way. On the other hand, if a Nation undertakes not to make peace or war at all without the consent of another Nation, or not to send or receive Ambassadors, such an undertaking would substantially impair its Independence, and the Nation which has so contracted with another Nation will have become virtually dependent upon it.

Unequal Leagues not contrary to Equity.

§ 228. Vattel[8] has made a distinction between Unequal Leagues which are contrary to Equity, and Unequal Leagues which are not contrary to Equity, and consequently not contrary to Natural Law. Of the latter kind are those which contain conditions, which a Nation may feel authorised by the care of its own safety to impose upon another Nation, either by way of precaution against probable danger, or by way

[8] Droit des Gens, L. II. § 180.

of penalty in order to punish an unjust aggressor, and to render the Nation incapable for some time of renewing its aggression. A Nation, which has been victorious in war, dictates for the most part to its adversary unequal terms of peace. There is a limit, however, beyond which such inequality may not extend without awakening the alarm and enlisting the sympathy of other Nations in behalf of the vanquished. "Sound policy," writes Vattel, "will not permit a Great Power to suffer the Small States in its neighbourhood to be oppressed. If it abandons them to the ambition of a Conqueror, the latter will very soon become formidable to it in its turn. Accordingly Sovereigns, who are in general sufficiently true to their own interests, seldom fail to observe this maxim. Hence the Leagues, at one time against the House of Austria, at another time against its Rival, according as the one or other Power preponderated. Hence that Equilibrium, the perpetual object of Negociation and War."

Personal and Real Leagues.

§ 229. Another celebrated distinction of Leagues, which is recognised by Grotius[9] and Puffendorf, is that which divides them into Personal and Real. "The former," says Puffendorf[10], "are such as are made with the Prince purely with relation to his Person, and expire with him; the latter are such as are made with the Kingdoms or Commonwealths, rather than the Prince or Government, and these outlive the Ministry and the Government itself, under which they were first made." Vattel[11] adopts a somewhat clearer and sounder definition, when he says that Personal Treaties relate to the *persons* of the Contract-

[9] De Jure Belli et Pacis, L. II. c. 16. § 16.
[10] Law of Nature and of Nations, L. VIII. c. 9. § 6.
[11] Droit des Gens, L. II. § 183.

ing Parties, and are confined and in a manner attached to them; whilst Real Treaties relate only to *things* or matters in negociation between the Contracting Parties, and are wholly independent of their persons. A Personal Treaty expires with him who contracts it; a Real Treaty attaches to the body of the State, and subsists as long as the State, unless the period of its duration has been expressly limited. Thus every Treaty concluded between the Kings of France and the Sultans of Constantinople from 1535 down to 1740, expired on the death of the Sultan for the time being. The Treaty of 1740, between King Louis XV and Sultan Mehemet II, was the first which in terms bound their successors. It is of great importance not to confound these two kinds of Treaties. Accordingly Sovereigns are at present accustomed to express themselves in their Treaties in such a manner as to leave no uncertainty in this respect, and this is doubtless the best and surest plan. In default of this precaution the subject-matter of the Treaty, or the expressions, in which it is conceived, may furnish means to ascertain whether it be Real or Personal.

Tests of Continuing Treaties.

§ 230. Vattel has laid down certain general rules for ascertaining the character of a Treaty, whether it be a continuing Treaty after the death of one of the Contracting Parties. The circumstance, that a Treaty is concluded in the name of a Sovereign Prince, does not thereby constitute it a personal Treaty, although when a Treaty is concluded in the name of a Republic or Popular Government, it is the Nation itself which contracts, and the Treaty is undoubtedly a Real Treaty. Public Treaties concluded by a King are Treaties of the State, and are obligatory on the Nation over which the King is Sovereign, and which he

represents for external purposes. The presumption accordingly, in respect of every Public Treaty, is, that it concerns the State itself, and is so far a Real Treaty. The question however as to its continuance is not thereby settled. It may be binding on the Nation, but the length of time, during which it shall bind the Nation, may vary with the terms of the Treaty, or the subject-matter of it. Thus if a Treaty is concluded for a certain number of years, or is declared to be perpetual, its duration will not be dependent upon the lives of the contracting parties; or if a King declares in a Treaty that it is made for himself and his Successors, or that it is made for the good of his Kingdom, it is manifest that the Treaty is intended to last as long as the Kingdom itself. In case of doubt, if there be no expressions in the Treaty itself, nor any circumstance *dehors* the Treaty, which will determine its duration, it ought to be presumed to be a Real Treaty, if its provisions are favourable; if its provisions on the other hand are odious, it may be with reason concluded to be a Personal Treaty, and as such intended to expire upon the death of either of the Contracting Parties. By *favourable provisions* are meant such provisions as tend to the mutual advantage of both the Contracting Parties; by *odious provisions* are understood such provisions as are either an absolute burden upon one of the Parties, or are more burdensome on the one than on the other Party. This rule for determining the continuing operation of Treaties is conformable to Reason and Equity. In the absence of certainty we must have recourse to probability. When the question relates to things favourable and equally advantageous to both Parties, it is consistent with probability that they should intend their contract to be permanent, and no injury

can result to either Party by the contract being perpetuated. If, on the other hand, there be any thing odious in the Contract, if there be penal or prohibitive clauses in the Treaty, which lay a burden upon one of the Parties to it, there is no reasonable ground for supposing in the absence of positive words to that effect, that the Sovereign, who entered into such engagements, intended to burden his kingdom for ever. On the contrary, every Sovereign is presumed to desire the safety and advantage of the Nation which he represents, and not to intend to load it for ever with a burdensome obligation. On the other hand, it is consistent with probability, that the Party to the Treaty, who has imposed a burden on the other Contracting Party, if it was mutually intended by them that he should enjoy his advantage for ever, would not have neglected so to stipulate as to place the matter beyond a doubt, well knowing that mankind seldom submit to burdens, unless bound by formal obligations. If this presumption should be in a particular case inconsistent with the fact, and it should deprive a party of his Right, it will be a consequence of his own negligence. Thus much is certain, that if one or other of the Contracting Parties must sacrifice a Right, it will be a less violation of Equity, that the one should forego an anticipated advantage, than that the other should suffer an unexpected loss. It is the famous distinction between "de lucro captando" and "de damno vitando [12]."

§ 231. The term "League" has been adopted by Kennett, the translator of Puffendorf, to distinguish that species of Public Compact between Nations, which does not presuppose a State of War. Truces and

The Holy Alliance of 1815 a strictly Personal League.

[12] Droit des Gens, L. II. § 190.

definitive Treaties of Peace, which presuppose a State of War, belong to another Category, and will be considered apart. The most remarkable instance in modern times of a *Personal League*, is that which was concluded at Paris, (Sept. 14, 1815[13],) between the Emperor of Austria, the King of Prussia, and the Emperor of Russia; and which has been designated *the Holy Alliance*. It was signed in triplicate by the three Sovereigns personally, and does not bear any Ministerial counter-signature. It was published at St. Petersburg, on Christmas Day, 1815, by the Emperor Alexander, accompanied with a Manifesto, announcing that the object of the Alliance was to establish a Christian Fraternity amongst the Nations of Europe. The majority of the Sovereign Princes of Europe subsequently acceded to this Alliance, upon the invitation of one or other of the three Contracting Parties, but the Prince Regent of Great Britain was formally precluded by considerations of Constitutional Law from annexing his signature to it, as appears by his Letter of October 6, 1816. Much has been said of this Alliance both in praise and dispraise of it. It has been extolled as a declaration of the purest International Morality, it has been condemned as a Monarchical Compact against Popular Liberties. If its history be considered, and its contents examined, it may result that it neither deserves the encomiums bestowed upon it, nor merits the opprobrium lavished against it. It was a romantic effusion of political sentiment on the part of the Emperor Alexander, which had no practical meaning, and which Prince Metternich, Prince Hardenberg, and Lord Castle-

[13] Martens, N. R. II. p. 656. British and Foreign State Papers, vol. III. 1815–1816, p. 211. The words "Au nom de la très Sainte et indivisibile Trinité," are prefixed to the Treaty, which circumstance is not without precedent.

reagh combated in vain; and to which the Emperor of Austria and the King of Prussia unwillingly acceded, from personal considerations towards their ally. Its tone savours more of a Papal Rescript than a Political Treaty, for the sum and substance of it is to affirm, that the Princes of Europe and their Peoples are members of one Great Christian Nation, and that Peace amongst those members can only be preserved by the practice of the duties, which the Saviour of mankind has inculcated. Klüber regards the Holy Alliance as the formal application of Christian Morality to the Government of mankind, and to the mutual intercourse of Nations. Its place in the system of the Public Law of Europe was fixed by the Protocol of Nov. 15, 1818, signed by the Plenipotentiaries of Austria, France, Great Britain, Prussia and Russia, assembled in conference at Aix-la-Chapelle, in which it is spoken of as forming "a bond of Christian Fraternity amongst the Sovereigns themselves [14]." The declaratory part of the Treaty is as follows: "Déclarent solennellement, que le présent Acte n'a pour objet que de manifester, à la face de l'Univers, leur détermination inébranlable de ne prendre pour règle de leur conduite, soit dans l'administration de leurs Etats respectifs, soit dans leur relations politiques avec tout autre gouvernement, que les préceptes de cette Religion Sainte, préceptes de justice, de charité, et de paix, qui, loin d'être uniquement applicables à la vie privée, doivent, au contraire, influer directement sur les résolutions des

[14] Qu'elles sont fermement décidées à ne s'écarter ni dans leurs relations mutuelles, ni dans celles qui les tiennent aux autres états, du principe de l'Union intime, qui a présidé jusqu'ici à leurs rapports et interêts communs; union devenue plus forte et indissoluble par les liens de fraternité Chrétienne, que les souverains ont formés entre eux. Martens, N. R. IV. p. 555.

Princes et guider toutes leurs démarches, comme étant le seul moyen de consolider les Institutions humaines et de remédier à leurs imperfections [15]."

History of the Holy Alliance.

§ 232. The Holy Alliance was so singular in its conception, and its political import was so totally different in fact from what has been generally supposed, that it may not be superfluous to give a short account of it. The Emperor Alexander of Russia was liable to periodical accesses of political excitement, which breathed sometimes the Spirit of Absolute Monarchy resting on Divine Right, at others savoured of the lessons which he had early imbibed in an opposite spirit under the tuition of La Harpe. It was under the influence of strong excitement of the former character, that he communicated to his two Allies at Paris his project for the establishment of a Christian Fraternity amongst the Sovereigns of Europe. Both these Monarchs endeavoured in vain by reasoning with their august Ally to persuade him to abandon his project, and the arguments of their Ministers, Prince Metternich and Prince Hardenberg, as well as of Lord Castlereagh, who represented the Prince Regent in the Conferences at Paris, had as little weight with him as the intercessions of the Sovereigns. So excited indeed was the imagination of the Emperor Alexander by the general opposition to his views, that the Emperor of Austria expressed to Prince Metternich and Lord Castlereagh his conviction, that, if the Allies persisted in refusing altogether to sanction the Emperor's project, the effect might be seriously prejudicial to his mind. It was determined

[15] Martens, N. R. II. p. 657. Most of the European Sovereigns acceded to the Act. The accession of Louis XVIII of France took place on Nov. 19, 1815, and his Act is printed in D'Angeberg's Congrès de Vienne, 2me partie, p. 1549.

accordingly, with a view to deprive the Alliance of all substantial importance as a Political Act, that it should receive the signatures of the Sovereigns alone, without any Ministerial counter-signature. After the document had been drawn up and signed by the three Sovereigns, a copy was transmitted to Lord Liverpool, who was the Chief of the British Cabinet, by Lord Castlereagh, accompanied by an autograph letter addressed to the Prince Regent, written by the Emperor of Russia himself and signed by the three Allied Sovereigns, in the following terms:—

Paris, le 26 September, 1815.

Monsieur notre Frère et Cousin,

Les évènemens, qui ont affligé le monde depuis plus de 20 ans, nous ont convaincu, que le seul moyen d'y mettre un terme se trouvoit dans l'Union la plus franche et la plus intime entre les Souverains, que la Divine Providence a placé à la tête des Peuples de l'Europe. L'Histoire des 3 années mémorables, qui viennent de s'écouler, atteste les effets bienfaisants, que cette Union a produit pour le salut de l'humanité, mais afin d'assurer à ce lien la solidité que réclame impérieusement la grandeur et la pureté du but, vers lequel il tend, nous avons pensé qu'il dût être fondé sur les principes sacrés de la Religion Chrétienne.

Profondement pénétré de cette importante vérité, nous avons conclu et signé l'Acte, que nous soumettons aujourd'hui à la méditation de votre Altesse Royale. Elle se persuadera qu'il a pour objet de raffermir les rapports qui nous unissent, en formant de tous les Peuples de la Chrétienté une seule et même Famille, et en leur assurant par là, sous la protection du Tout-Puissant, le bonheur, le salut, les bienfaits de la paix et des liens de fraternité à jamais indissolubles. Nous avons vivement regretté que Votre Altesse Royale n'ait point été réuni avec nous dans le grand moment, où nous avons conclu cette Transaction. Nous l'invitons comme notre premier et

plus intime Allié à y accorder, et à compléter une œuvre uniquement consacré au bien de l'humanité, et que nous devons dès lors considérer comme la plus belle récompense de nos efforts.

FRANÇOIS.
FRÉDÉRIC GUILLAUME.
ALEXANDRE.

Notre Frère et Cousin,
Le Prince Régent de la Grand Bretagne.

Lord Castlereagh at the same time took the precaution of transmitting the draught of an innocuous answer for the Prince Regent to send back. This draught underwent a careful revision at the hands of Lord Liverpool, and the contents of it, as ultimately settled, were as follows :—

Carlton House, Oct. 6, 1815.

Sir, My Brother and Cousin,

I have had the honour of receiving your Imperial Majesty's Letter, together with the Copy of the Treaty signed by your Majesty, and your August Allies, at Paris, on the 26th of September.

As the forms of the British Constitution, which I am called upon to administer in the name and on the behalf of the King, my Father, preclude me from acceding formally to this Treaty, in the shape in which it has been presented to me, I adopt this course of conveying to the August Sovereigns, who have signed it, my entire concurrence in the principles they have laid down, and in the declaration which they have set forth, of making the Divine precepts of the Christian Religion the invariable rule of their conduct, in all their relations, social and political, and of cementing the Union which ought ever to subsist between all Christian Nations; and it will always be my earnest endeavour to regulate my conduct, in the station in which Divine Providence has vouchsafed to place me, by these sacred maxims, and to cooperate with my August Allies

in all measures which may be likely to contribute to the peace and happiness of mankind.

With the most invariable sentiments of friendship and affection,

I am,

Sir, My Brother and Cousin,

Your Imperial Majesty's Good Brother and Cousin,

GEORGE P. R.

His Imperial Majesty
the Emperor of Austria.

The Family Compact of the House of Bourbon.

§ 233. The Treaty of Friendship and Union concluded at Paris (August 15, 1761[16]) by the Plenipotentiaries of the Very Christian King and the Catholic King, is an instance of a *Family League*, which may be regarded as an enlarged form of a *Personal League*. The object of this Treaty, which is expressly designated in the Preamble as a Family Compact, was to establish a perpetual alliance between the French and Spanish branches of the House of Bourbon, and to afford to either Crown a reciprocal guaranty of all its possessions wheresoever situated. The simple demand of succour on the part of either Crown was to constitute a *casus fœderis* without the necessity of any explanation. Provision was made by the nineteenth article of the Treaty for the admission of the Neapolitan branch of the House of Bourbon. Although this Treaty was made by the two Sovereigns on behalf of themselves and their Successors, and so far in terms satisfies one of Vattel's definitions of a Real Treaty[17]; yet the subject of it discloses the intention of the Contracting Parties to confine its benefits to

[16] Martens, Recueil, I. p. 16.

[17] Droit des Gens, L. II. § 188. De même, lorsqu'un roi déclare dans le traité, qu'il le fait *pour lui et ses successeurs*, il est manifeste que le Traité est réel. Il est attaché à l'Etat, et fait pour durer autant que même le royaume.

the House of Bourbon, so clearly, that it may be regarded as altogether exceptional [18], seeing that it contains an express provision (Art. XXI), that no other Powers than those, which may be of the House of Bourbon, can be invited or admitted to accede to it. Accordingly we find, when His Catholic Majesty made a formal application to Louis XVI of France in 1790 for aid, in pursuance of this Treaty, in defence of his possessions on the West Coast of North America against Great Britain, the National Assembly, to which body Louis XVI was obliged, under the altered condition of the Monarchy in France, to submit the letter of the King of Spain, demurred to the application, considering the Family Compact between the two Crowns not to be identical with a Public Treaty between the two Nations [19].

Treaties of Navigation and Commerce.

§ 234. The object of all Leagues is the promotion of Society amongst Nations, and this Society relates either to peaceful Commerce, or to community of War [20]. Leagues which relate to Commerce may be of various kinds. The rudiments of Commercial Leagues may be traced in the stipulations between Nations for the hospitable reception of Strangers, and the distinction between the foreigner regarded quâ *βάρβαρος*, and the foreigner regarded quâ *ξένος*, consisted in the circumstance, that the latter had a claim

[18] Kings do not always treat solely and directly for their Kingdoms. Sometimes by virtue of the power they have in their hands, they make treaties relative to their own persons, or their families, and this they may lawfully do, as the welfare of the State is interested in the safety and advantage of the Sovereign, properly understood. These treaties are personal in their own nature, and expire of course on the death of the King or the extinction of his family. Such an alliance is made for the defence of the King and his Family.—Vattel, L. II. § 195.

[19] Twiss on the Oregon Question, London, 1846, p. 112. Annual Register, 1790, p. 303.

[20] Puffendorf, c. 8, c. 9.

of *Right* to Hospitality, which the former had not. An early example of this kind of League may be seen in the Treaty concluded between Alyattes King of Lydia and the Citizens of Miletus, whereby it was provided that the two Nations should be the guests and allies of one another [21].

As soon as the security of private intercourse between the individual members of different Nations had been established, the commercial interchange of commodities for the most part followed in the wake of Hospitality. Foreign commerce thus sprang up, and in many States, where foreign commerce became important, it was found necessary to place it under regulations, and wherever Taxation became an engine of State government, duties or tolls came to be imposed upon foreign merchants frequenting the ports of a State. Treaties of Navigation and of Commerce thereupon came to be agreed upon between Nations, whereby it was provided that the subjects of the one Power might safely trade in the ports of the other Power on condition of paying customary tolls, or of paying not more than a fixed toll, or of paying not more than was paid by subjects or favoured Allies.

A Treaty of Navigation and Commerce may be for a term of years or for an indefinite period; it may provide for trade merely, as for instance for the importation and exportation and transit of particular merchandise, for the port-dues, and transit-dues, and custom-dues, to be levied thereupon; or for the incidents of trade in connexion with the residence of merchants; as for instance, the exercise of jurisdiction, the practice of religion, the payment of personal taxes. The provisions of a Treaty of Commerce may

[21] Herodot. Hist. L. I. § 22.

extend even further, and may apply to the contingencies of war breaking out between the contracting parties and a third Power, or between Powers which are strangers to the contracting parties. Thus it may be provided that, if war should break out between the contracting Powers, the subjects of either Power, resident in the territory of the other Power, should be allowed an interval of time to collect their goods and effects, and to withdraw in safety to their own country[22]; or it may be provided, that, if war should break out between one of the Contracting Powers and a third Power, certain goods shall not be regarded by the former as Contraband of War, or that certain vessels shall not be liable to search or seizure by the former, if laden with cargoes belonging to the subjects of any third Power, or that Privateers shall not be allowed to be fitted out or provisioned in the ports of one of the contracting parties by any Third Power engaged in war with the other contracting party[23]. Again, it may be provided in case of war breaking out between Powers which are Strangers to the contracting Parties, that the latter will maintain the security of their mutual commerce on the High Seas by an armed force, if it should be required; or that debts due from individuals of the one Nation to individuals of the other, and the shares or money which they may have in the public funds, or in public or private banks, shall never in any case of war be sequestrated or confiscated; or that foreign subjects shall be permitted[24] to remain and continue their

[22] Such stipulations have become an accustomed *formula* in Commercial Treaties. — Kent's Commentaries, I. § 56. Martens' Précis, § 259. Bynkershoek, Qu. Jur. Publici, L. I. c. 7.

[23] Treaty between France and the United States of America, Feb. 6, 1778. Martens, Recueil, II. p. 595.

[24] Treaty between Great Britain and the United States of

business (if it be other than that of commerce on the high seas), notwithstanding a rupture between the Governments, so long as they conduct such business innocently[25].

A Nation may enter into a Treaty, by which it grants exclusive privileges of trade to one Nation and deprives itself of the liberty to grant similar privileges to another. Of this kind was the famous Methuen Treaty[26] concluded between Great Britain and Portugal (Dec. 27, 1703), whereby Portugal obtained a preferential scale of duties for her wines in British markets, whilst Great Britain, on the other hand, obtained what she considered to be a satisfactory equivalent, by securing the opening of the Portuguese markets for her woollen manufactures. It was formerly the policy of the Christian Nations of Europe to obtain exclusive privileges of trade by Treaties with Asiatic and African Nations. Thus the Dutch engrossed to themselves the trade in cinnamon and other produce of the island of Ceylon, by a Treaty with the King of Candy[27]. An opposite policy now prevails; and we find accordingly that Great Britain took care to recite in her Treaty[28] with China, that the Five Ports had been declared to be open to the trade of all Nations heretofore trading at Canton, and stipulated only for her own subjects the same

America, Nov. 19, 1794. Martens, Recueil, V. p. 662. Grotius, De Jure B. et P., L. III. c. 20. § 16.

[25] Treaty between the United States of America and the Republic of Chili, May 16, 1832. Martens, N. R. XI. p. 439. The provisions of this Treaty deserve attention, as they are most comprehensive.

[26] Chalmers' Collection of Treaties, T. II. p. 305.

[27] Traité de Paix entre la Hollande et le Roi de Candy (Feb. 14, 1766). Martens, Recueil, T. I. p. 319.

[28] Supplemental Treaty of Houmon-Schai (Oct. 8, 1843). Martens, N. R. Gén. T. V. p. 595. B. & F. State Papers, XXXI. p. 132.

privileges, as should at any time be accorded to the Subjects of other Powers.

Treaties of Jurisdiction.

§ 235. Treaties of Jurisdiction are for the most part of two kinds: they either provide for the establishment of special tribunals for the adjudication of all questions which may arise amongst foreign merchants, or between foreign merchants and the Subjects of the State wherein such merchants carry on their trade; or they provide for the exercise of jurisdiction by Consuls or Commercial Agents over their own countrymen within the territory of the State wherein they carry on their trade, or over their own countrymen and the subjects of such State, in matters of trade which may come into dispute between them. A foreigner, under the Common Law of Nations, may sue a Subject of the State wherein he resides in the Courts of that State, and he may be sued in those Courts by Subjects of that State. A foreigner may in like manner sue a foreigner in the Courts of a State wherein they are both resident. Jurisdiction as between Nations being territorial is founded by the presence of an individual within the territory of a Nation.

The Tribunals however of a State are not under any obligation to administer the Law of a Foreign State, unless there be a Treaty between the States to that effect. In the cases where Treaties provide for the erection of tribunals to decide all controversies between Strangers (transeuntes) who are not domiciled, such tribunals administer the Foreign Law, if it be invoked to settle the dispute. Thus there were Treaties between Great Britain and Portugal [29], and

[29] Treaty of Westminster, July 10, 1654. Hertslet, II. p. 8. Treaty of Rio Janeiro, Feb. 19, 1810. Hertslet, VI. p. 28. Martens, N. R. III. p. 194. These engagements have been deter-

between Great Britain and Spain [30], and between France and Spain, and between France and Portugal, and between Spain and Portugal, under which special tribunals were provided, over which a Judge Conservator was appointed to preside; whose function it was to decide all disputes in commercial matters, which might arise between the Subjects of the respective States. If, however, a Natural born subject of Great Britain or of France had acquired a Domicil in Spain or Portugal, he became amenable to the ordinary tribunals of either country [31] in any controversy with the Subjects of that country. On the other hand, Treaties provide sometimes for the exercise of an alternative Jurisdiction, as for instance, the Treaty of St. Petersburg [32], concluded between France and Russia, (Jan. 11, 1857,) provided that the Consuls of either Power should exercise an exclusive jurisdiction over the masters and crews of the vessels of their own Nation within the Ports of the other Nation; and should exercise a *voluntary* jurisdiction over merchants of their own Nation, which, if such merchants had recourse to it, the Government of the country to which the Consuls were accredited should enforce; but such merchants might, if they were so minded, in the first instance, have recourse to the ordinary tribunals of the country, which by the local law were empowered to take cognisance of commercial matters. Russia, at the period when this Treaty was concluded, was in substance an Oriental Power, and there are accordingly found in this Treaty a variety of provisions, which

mined by the Treaty of London, July 3, 1842. Hertslet, VI. p. 598.

[30] Treaty of Madrid, May 23, 1667. Hertslet, II. p. 140. Treaty of Utrecht, Dec. 9, 1713. Hertslet, II. p. 205.

[31] Fœlix, Droit International Privé, § 148.

[32] Martens, Recueil, IV. p. 196.

are affirmations of the Common Law of Nations, as then received in Western Europe; which, however, had not at such time acquired the sanction of Usage, as a rule of intercourse between Russia and the Western Powers.

Treaties which give an exclusive authority to the Consuls and Commercial Agents of a Nation to decide all disputes amongst merchants of their own country, and between merchants of their own country and the Subjects of the State to which they are accredited, are for the most part founded on a necessity arising out of the great discrepancies which exist between the Laws of the respective Nations in Civil and Criminal matters. The Christian Powers of Europe have from a very early period entered into Treaties of this kind with the Ottoman Porte [33], and with its Dependencies on the Barbary Coast [34], under which the Consuls of such Powers have exercised an exclusive jurisdiction over their own countrymen in all matters of difference amongst themselves. Treaties for an analogous purpose have been within recent time concluded between Great Britain and China [35], (July 29, 1843,) and between Great Britain and Japan [36], (August 26, 1858,) with the further provision, that all controversies arising in China or in Japan, between British and Chinese Subjects on the one hand, and between British and Japanese Subjects on the other, shall be determined by the British Consul, assisted in the one case by a Chinese, in the other by a Japanese Officer. The Jurisdiction over British Subjects in Criminal matters is to be exercised exclu-

[33] Hertslet, Treaties, II. p. 346.

[34] Algiers, Hertslet, I. pp. 61, 70. Tripoli, ib. pp. 127, 146. Tunis, ib. pp. 161, 166.

[35] Martens, N. R. Gén. V. p. 434. Hertslet, VI. p. 247.

[36] Martens, N. R. Gén. XVI. part II. p. 430.

sively by the British Authorities, even in cases where British Subjects commit any crime against Chinese or Japanese Subjects or the Subjects or Citizens of any other country. In the Treaty concluded between the Emperor of China and the United States of America [37], (July 3, 1844,) there is a provision to the effect, that all controversies occurring in China, between Citizens of the United States and the Subjects of any other Government, shall be regulated without any regard to the Chinese Authorities, or without any intervention on their part. It is the practice of France, in accordance with the principles of her Civil Law, to conclude Treaties with Foreign Powers, whereby Jurisdiction is granted to the Consuls of France over French merchant vessels, in regard to any difference which may arise between the Captain, Officers, and Crews of such vessels, either on the High Seas or in the Ports of such Powers, and the aid of the Local Authorities is guaranteed to support the Jurisdiction of the Consul, if he shall invoke it [38].

Treaties of Extradition.

§ 236. Treaties of Extradition are another form of Treaty, whereby effect is given to the Jurisdiction of a State over its Subjects, who may have escaped into the territory of another State. The Common Law of Nations regards all Jurisdiction as founded on the possession of territory by an Independent Community. The Legislative Power of the Nation extends over all persons and property within the limits of its territory; but its laws do not operate *vigore suo* beyond its territory. Crimes against its Laws are altogether local, and cognisable only in

[37] Martens, N. R. Gén. VII. p. 134.

[38] The Convention of Feb. 23, 1853, between France and the United States of America, contains this amongst other special engagements. Treaties of the United States, p. 114. Wheaton's Elements, 1857, p. 171.

the country in which they are committed. No other Nation, therefore, has any right to punish them, nor is under any obligation to take notice of them, neither is any other Nation bound to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory, wherein they have been committed[39]. Such has been the tenor of a long course of decisions in British Courts of Law. "Penal Laws of Foreign Countries are altogether local," says Lord Loughborough[40], "and affect nothing more than they can reach, and can be seized by virtue of their authority." Mr. Justice Buller, in the same case upon a Writ of Error[41], says, "it is a general principle that the Penal Laws of one Country cannot be taken notice of by another Country." A similar doctrine has been frequently recognised in the Courts of the United States of America. Thus Chief Justice Marshall[42], in delivering the judgment of the Supreme Court in the case of a foreign vessel engaged in the Slave trade, which had been captured by an American Cruizer, said, "the Courts of no Country execute the Penal Laws of another Country." So likewise Chief Justice Spencer, when called upon in the District Court of New York to give effect to a Law of Connecticut, said, "the Defendant cannot take advantage of, nor expect the Court to enforce the Criminal Laws of another State. The Penal Acts of one State can have no operation in another State. They are strictly local, and affect nothing more than they can reach[43]."

[39] Story, Conflict of Laws, § 620.

[40] Folliott v. Ogden, I. H. Blackstone, p. 135.

[41] Ogden v. Folliott, 3 Term Reports, p. 733.

[42] The Antelope, 10 Wheaton, p. 123.

[43] Scoville v. Canfield, 14 Johnson's Reports, p. 338.

§ 237. Certain Jurists have maintained that a State is under an obligation to punish Fugitives from Justice, on the demand of the State from whose jurisdiction they have withdrawn themselves[44]; in other words, that a State is bound to allow its own Courts to exercise its own Jurisdiction over foreigners in respect of offences committed in Foreign Countries. But these writers rest this question too exclusively on the traditions of the Roman Civil Law, which regarded the various States of Christendom as succeeding to the relations, which formerly existed amongst the Provinces of the Roman Empire. But the Roman Law, if carefully examined, suggests another principle, when it orders Fugitives from Justice to be remitted to the *forum delicti*. The grounds, upon which such remission indeed was founded, rest equally upon the Imperial Supremacy, "Jure tamen civili notandum, remissionibus locum fuisse de necessitate, ut reus ad locum, ubi deliquerit, suo petente judice, fuerit mittendus, quod omnes judices uni subessent imperatori[45]." It would thus seem that in either case, whether the Criminal was tried in the place where he was found, or sent back for trial to the place where the crime had been committed, the Authority under which the trial or the remission of the Criminal took place was one and the same, namely, the Paramount Authority of the Emperor.

Civil Law of the Romans as to Fugitives from Justice.

§ 238. In the case of Nations there is no corresponding Paramount Authority to which all defer, and Jurists are divided in opinion whether there is any obligation upon a Nation to deliver up Fugitives from Justice upon the demand of another Nation. States

Common Law of Nations.

[44] Hertius de Collisione Legum, § 4. n. 18. P. Voet de Statut. c. 4. n. 6.

[45] P. Voet de Statutis, s. XI. c. 1. n. 6.

have without a doubt a right to refuse an asylum to the subjects of Foreign States. Martens designates this right as *Le Droit de Renvoi*[46]. From a passage in a letter written by Sir Leoline Jenkins[47] at Nimeguen to Mr. Secretary Williamson, (April 3, 1675,) it would seem, as if the early Usage amongst Nations had been for States to decline jurisdiction over foreigners altogether, and to send them to their own country to be tried by their Natural Judges, but that such Usage had become obsolete in his time, as he speaks of "the *matter of renvoy* being disused altogether amongst Princes." Certain Jurists however maintain, that according to the usage of Nations States are obliged to refuse an asylum to the subjects of Foreign States, who are accused of crimes which affect the Public Peace and the security of Human Society, and whose surrender to its Officers of Justice is requested by the State, within whose territory the crime has been committed. Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Böhmer, Schmelzing, Kent, and Pasquale Fiore maintain the affirmative side of the question, whilst we find arrayed on the negative side Puffendorf, Voët, Leyser, Martens, Klüber, Kluit, Saalfeld, Schmalz, Mittermaier, Mangin, Wheaton, Heffter, Ortolan, Bluntschli, and Phillimore. In the conflict of opinion amongst such high authorities we may safely have recourse to the practice of Nations. Great Britain, France, Russia, and the United States of America, have repeatedly declined to surrender up Fugitives from Justice on the demand of Foreign Powers, with which they had no Treaties to that effect, or in cases where the crimes alleged did not come within the scope of any existing

[46] Précis du Droit des Gens, § 91 *b*.
[47] Life of Sir Leoline Jenkins, vol. II. p. 714.

Treaty of Extradition. M. Fœlix seems to have stated the practice amongst Nations very correctly, when he says that all Extradition is subordinate to considerations of convenience and reciprocal interest[48]. The authorities of a State are not obliged to surrender up a Criminal for the purpose of Extradition, except where there exists between two States Treaties formally applicable to the subject-matter.

Extradition of Fugitive Slaves and of Deserters, a frequent subject of Treaty-Engagement.

§ 239. Treaties of Extradition in their earliest form appear to have contained stipulations for the surrender of fugitive slaves, and Compacts with that object in view were not unusual amongst the Nations of Greece[49]. It would appear to have been the practice amongst those Nations to afford sanctuary to fugitive slaves, unless there was an International Compact to the contrary, or a provision to that effect embodied in some Treaty of Commerce.

It is obvious that wherever Personal Servitude is recognised as a *Legal Status*, every attempt to change that *Status* without the legal formalities of Emancipation will be a crime against the Law of the State, and every fugitive slave will be *ipso facto* a Criminal according to that law. We find accordingly an article inserted in the Constitution of the United States of America (anno 1787), whereby the respective States bound themselves to deliver up Fugitive Slaves on the claim of the Slave-Master, notwithstanding the *Status* of Slavery was not a *Legal Status* in some of the States. "No person held to service or labour in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labour,

[48] Traité du Droit International Privé, L. II. § 608.
[49] Titi Livii Historia, L. XLI. c. 424.

but shall be delivered up on claim of the party to whom such service or labour may be due [50]."

The Treaties in modern times which bear most analogy to the ancient Treaties for the surrender of Fugitive Slaves are Treaties for the Extradition of Deserters from the military or naval service of a State. It is almost the universal practice of civilised Nations to conclude with one another Treaties, which have the latter object in view. The necessity for such Treaties is obvious between Conterminous States, where their military or maritime service is recruited by forced levies raised either by Conscription or by Impressment.

Extradition of Political Offenders, exceptional.

§ 240. The earliest Treaties of Extradition amongst the Nations of Europe since the fall of the Roman Empire appear to have been Treaties between Conterminous States such as England and Scotland (anno 1308), France and Savoy (anno 1378), for the surrender of Fugitives from Justice, who were charged with the commission of crimes against the peace of Society, such as murder, piracy, robbery, or forgery. M. Fœlix has reviewed the various Treaties which exist upon this subject amongst the Nations of Europe. France, Spain, Portugal, the Papal States, Holland, Sardinia, Belgium, Switzerland, and Great Britain, have severally entered into Treaties with various other Powers for the surrender of Fugitives

[50] The Constitution of the United States, as distinguished from the Articles of Confederation, bears some analogy to the Final Act of the Germanic Confederation, as distinguished from the Federal Act. The provisions of the Constitution have all the force of an International Compact between the respective States, which under the Articles of Confederation were declared to retain their Sovereignty, Freedom, and Independence, and every Power, Jurisdiction, and Right, which was not by such Confederation expressly delegated to the United States in Congress assembled.

from Justice who have been guilty of crimes against the person or against property; but they have not extended the engagements of such Treaties to persons accused of Political Offences. On the other hand, Russia, Austria, Prussia, and the various other States which composed the Germanic Confederation, the Two Sicilies, Denmark, Norway, and Sweden, have entered respectively into Treaties for the surrender of Fugitives from Justice, accused of High Treason against the State from which they have escaped. Amongst the American States we find Treaties of the former kind concluded by the United States, and by Brazil, and of the latter kind by Columbia, by Peru, and by Mexico. It will be seen that the surrender of Political Offenders is rather the exception than the rule of such Treaties.

Every Treaty of Extradition takes effect in regard to crimes committed before it was concluded, unless its operation shall be expressly restricted, but with regard to the character of any crime alleged as warranting the demand for the surrender of a Fugitive from Justice, all Treaties of Extradition are *stricti juris*, being penal in their character and in exception to the Common Law of Nations. Their operation accordingly may not be extended beyond the letter of their stipulations.

Treaties of Extradition for the most part temporary.

§ 241. Heffter has very aptly remarked that the very fact of the existence of so many special Treaties respecting the Extradition of Fugitives from Justice is conclusive, that there is no such Usage amongst Nations, which constitutes the surrender of such Fugitives upon the demand of a State, whose laws have been violated, a perfect obligation upon other States. It is not unimportant to note, that Treaties of Extradition are for the most part made for a given term

of years; as, for instance, the Treaty between Great Britain and the United States, (Nov. 19, 1794[51],) was in this respect limited in duration to twelve years. This Treaty having expired in due course, in respect of the XXVIIth Article, which contained the provision for the Extradition of criminals, the United States accordingly maintained upon a demand being subsequently made by the British Government for the surrender of Daniel Sullivan, a British Subject, the master of a British Schooner, the Maria, who had run away with the Schooner and her cargo, and carried them into Mount Desart in the State of Maine, that as the engagement of the Treaty was for a limited time and had not been renewed, the United States were not under any obligation by the Common Law of Nations to restore the vessel and to deliver up the master and crew who had carried her off. Mr. Wirt, the Attorney General of the United States, in the legal opinion which he submitted to his Government, (Nov. 20, 1821,) stated, that he considered there was nothing in the Law of Nations, as explained by the Usage and Practice of the most respectable among them, which imposed on the United States any obligation to deliver up the Fugitives[52]. The Treaty of Washington, sometimes called the Ashburton Treaty, has been subsequently (August 9, 1842) concluded between the United States and Great Britain, under which the Extradition of the slave Anderson[53], who

[51] Martens, Recueil, V. p. 686. Art. XXI. provided for the Extradition of all persons charged with the commission of murder or forgery within the jurisdiction of either State.

[52] Opinions of the Attorney Generals of the United States, I. p. 391.

[53] The Extradition of Anderson was demanded on a charge of murder. He was not delivered up, as the Court of Common Pleas in Canada, on motion for a *Habeas Corpus* to discharge him from the custody of the gaoler, to which he had been committed under a Magistrate's

had escaped from the State of Missouri into Canada, was demanded: but there is in this Treaty an express provision that the tenth Article, which provides for the Extradition of Fugitives from Justice, shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer. The Tenth Article is in the following terms: "It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided, that this shall only be done upon such evidence of Criminality, as according to the Laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates

warrant, found that there were some informalities in the proceedings before the Magistrate, and directed him to be discharged. The Court of Queen's Bench in Canada had refused to grant a Writ of Habeas Corpus, and the friends of Anderson had thereupon applied to the Court of Queen's Bench in Westminster Hall for the Writ, which was granted. Before, however, the Writ from Westminster Hall could be served in Canada, the Court of Common Pleas in that Province had ordered the discharge of the fugitive.

respectively, to the end that the evidence of Criminality may be heard and considered; and if on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authorities, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive [54]."

The next following Treaty of Extradition, in regard to Fugitives from Justice, which Great Britain entered into with a Foreign State, was the Treaty of London, (Feb. 13, 1843,) concluded with France for the surrender in certain cases of Fugitives from Justice. By Art. I, it was agreed that the High Contracting Parties should, on requisitions made in their name through the medium of their respective Diplomatic Agents, deliver up to justice persons who, being accused of the crimes of murder, (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide, and poisoning,) or of an attempt to commit murder, or of forgery, or of fraudulent bankruptcy committed within the jurisdiction of the requiring Party, should seek an asylum, or should be found within the territories of the other: provided that this shall be done only when the commission of the crime shall be so established, as that the laws of the country where the fugitive or person so accused shall be found, would justify his apprehension and commitment for trial, if the crime had been there committed.

Consequently, on the part of the French Government, the surrender was to be made only by the

[54] Hertslet, VI. p. 859. Martens, N. R. Gén. III. p. 456.

authority of the Keeper of the Seals, Minister of Justice, and after the production of a warrant of arrest, or other equivalent judicial Document, issued by a Judge, or other competent Authority in Great Britain, clearly setting forth the facts for which the fugitive should have rendered himself accountable; and on the part of the British Government, the surrender was to be made only on the report of a Judge or Magistrate duly authorised to take cognisance of the acts charged against the fugitives in the warrant of arrest or other equivalent judicial document, issued by a Judge or competent Magistrate in France, and likewise clearly setting forth the said acts.

The expense of any detention and surrender made in the preceding Article was to be borne and defrayed by the Government, in whose name the requisition should have been made.

It was further provided that the Convention should not apply in any manner to crimes of murder, forgery, or fraudulent bankruptcy committed antecedently to the date thereof.

The Convention itself was to be in force until the 1st of January, 1844, after which date either of the High Contracting Parties was to be at liberty to give notice to the other of its intention to put an end to it, and it was to cease and determine at the expiration of six months from the date of such notice [55].

It will be seen that the stipulations of both these Treaties applied to all persons indiscriminately, who might be charged with any of the enumerated crimes, without any regard to their Nationality. A Convention of Extradition, comprising a much greater

[55] Hertslet, VI. p. 345. Martens, N. R. Gén. V. p. 20.

number of crimes, but specially excepting native subjects or citizens of the party upon whom the requisition might be made, was signed at London (May 28, 1852) between France and Great Britain [56]. It was provided by the Fifteenth Article, that the Convention should come into operation when an Act of Parliament should have passed to enable her Britannic Majesty to carry into execution the arrangements of the Convention; but the British Parliament declined to give the Executive Government the necessary Powers to execute its provisions, and the Convention which is now in force between Great Britain and France, is of a later day, namely, August 14, 1876.

§ 242. Prior to the year 1870 the Executive Government of Great Britain had no power to give effect to Treaty-Stipulations with Foreign Governments for the surrender of Fugitives from Justice without a special Act of Parliament authorising it in each case to give effect to the treaty, but in 1870 a Statute (33 and 34 Vict. ch. 52) was passed giving power to the Crown to apply by Order in Council its provisions to any treaty arrangement with a Foreign Power for the surrender of criminals accused of any of the crimes contained in a Schedule appended to the Statute, but prohibiting the surrender of any fugitive for an offence of a political character. This Statute was amended by a subsequent Act, passed in 1873 (36 and 37 Vict. ch. 60), which brought offences committed before 1870 within the provisions of 33 and 34 Vict. ch. 52, and added considerably to the Schedule of Extradition offences, including amongst them offences against the Slave Trade Acts. A Royal Commission on Extradition was subsequently ap-

[56] British and Foreign State Papers, vol. XLI. p. 20.

pointed in 1877, and their Report was published in 1878, and the tenor of their Report was to recommend that Statutory Powers should be granted to the proper British authorities to deliver up fugitive criminals, whose surrender should be asked for, notwithstanding there might be no treaty to that effect with the State against whose laws the offence has been committed. Such Statutory Powers however should be extended only to those States, to which it should be declared from time to time to apply by Order in Council. The principle upon which the Report proceeded was twofold; first, that it is the common interest of mankind that offences which militate against the good order of society should be repressed by punishment; and secondly, that it is for the interest of the State, within whose territory a criminal may have taken refuge, that he should not remain at large within it. The Commissioners further recommended that the list of Extradition offences should include all those offences which it is the common interest of mankind to suppress, but that offences of a local or political character should be excluded, nevertheless that a political motive should not be allowed to give immunity to a fugitive for a crime, which in itself, and apart from such motive, would be classed as an Extradition offence.

Treaties of Boundary.

§ 243. Treaties of Boundary belong to a class of Treaties, which are regarded by Jurists as perpetual in their nature; so that, being once carried into effect, they subsist independently of any changes which may supervene in the political circumstances of either contracting party, unless they are mutually revoked. Vattel[57] speaks of Compacts which have no relation to the performance of reiterated acts, but

[57] Droit des Gens, L. II. § 292.

merely relate to transient and single acts, which are concluded at once, and suggests that they may be more properly called by another name than that of Treaties. Martens [56] has accordingly proposed to call them *Transitory Conventions*, which Wheaton approves. "Les Traités de cession," says Martens, "des limites, d'échange, et ceux même qui constituent une servitude de Droit Public, ont la nature des Conventions transitoires; les Traités d'amitié, de commerce, de navigation, les alliances égales et inégales ont celle des Traités proprement dits (fœdera). Les Conventions Transitoires sont perpétuelles par la nature de la chose."

To the same effect Mr. Wheaton [57] says, "General Compacts between Nations may be divided into what are called *Transitory Conventions*, and Treaties properly so called. The first are perpetual in their nature, so that, being carried into effect, they subsist independently of any change in the sovereignty and form of Government of the Contracting Parties; and although their operation may in some cases be suspended during war, they revive on the return of peace without any express stipulation. Such are Treaties of Cession, Boundary, or Exchange of Territory, or those which create a permanent Servitude in favour of one Nation within the Territory of another.

The principle involved in the doctrine of Jurists, that such Treaties are perpetual in their nature, may be thus stated. The International Acts, which have in view the settlement of a territorial boundary, are in substance Declarations or Recognitions of a Nation's title to a given territory, although they assume

[56] Martens, Précis, § 58.
[57] Wheaton's Elements, Part III. c. 2. § 58.

for the most part the form of Compacts. The form has come into use, partly because articles for the cession of territory or for the settlement of a territorial boundary between belligerents are frequently comprised amongst the articles of a Treaty of Peace, partly because that form has been considered to confer upon the transaction a more binding character, than that which might be supposed to attach to a simple Declaration. But a Treaty of Boundary, as an Agreement or Convention, does not exercise any more permanently binding force upon the parties *vigore suo*, than any other Treaty. The more correct view would seem to be, that the arrangements under the Treaty derive their character of permanence not from the Treaty, but from the Common Law of Nations, inasmuch as when a Nation has once recognised another Nation to be in lawful Possession of a territory, the Right of Possession of the latter is thereby established against the former Nation, whatever changes may subsequently arise in their mutual relations, as friends or foes. The Common Law of Nations maintains the latter Nation in its State of Possession, whenever such Possession has had a lawful origin, and the former Nation is by that Law for ever precluded from challenging the lawful origin of a State of Possession, which it has once solemnly recognised.

Judicial Decisions as to the Permanent Object of Certain Treaties.

§ 244. The Practice of Nations accords perfectly with the doctrine of Jurists in this matter. Thus a question was raised before an English Tribunal touching the interpretation of the Ninth Article of the Treaty of 1794[58], between Great Britain and the United States of America, which is as follows: "It is agreed that British Subjects, who now hold lands in the territories of the United States, and American

[58] Martens, Recueil, V. p. 662.

Citizens, who now hold lands in the dominion of his Majesty, shall continue to hold them according to the nature and tenure of their respective states and title thereto, and may grant, sell, or devise the same to whom they please, in like manner as if they were Natives: and that neither they nor their heirs and assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as Aliens." The question raised in the Rolls Court[59] in this case in 1830 was, whether by the Article above recited "American Citizens, who held lands in Great Britain on the 28th day of October, 1795, are at all times to be considered, as far as regards those lands, not as Aliens, but as Native Subjects of the Crown of Great Britain."

The 28th Article of the Treaty had declared that the ten first Articles should be permanent, but the Counsel in support of the objection to the title contended that "it was impossible to suggest that the Treaty was continuing in force in 1813, as it necessarily ceased with the commencement of the War; that the 37 G. III. c. 97 (which was passed to give effect to the Treaty) could not continue in operation a moment longer without violating the plainest words of the Act; that the word 'permanent' was used not as synonymous with 'perpetual or everlasting' but in opposition to a period of time expressly limited." On the other hand, the Counsel in support of the title maintained, that "the Treaty contained Articles of two different descriptions, some of them being temporary, others of perpetual obligation. Of those which were temporary, some were to last for a limited period, such as the various regulations concerning trade and navigation, and some were to continue so long as Peace

[59] Sutton v. Sutton, 1 Russell v. Mylne, p. 663.

subsisted, but, being inconsistent with a state of War, would necessarily expire with the commencement of hostilities. There were other stipulations, which were to remain in force in all time to come unaffected by the contingency of Peace or War. For instance, there were clauses for fixing the boundaries of the United States. Were the boundaries so fixed to cease to be the boundaries the moment that hostilities broke out?"

Sir John Leach, who at such time filled the office of Master of the Rolls, in pronouncing judgment said, "The privileges of Natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the Treaty, that the operation of the Treaty should be permanent and not depend upon the continuance of a state of Peace."

"The Act of 57 G. III. c. 95 gives full effect to this Article of the Treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this Article, that it was to be permanent and independent of a state of Peace or War, then the Act of Parliament must be held in the 24th Section to declare this permanency, and when a subsequent Section provides that the Act is to continue in force, so long only as a state of Peace shall subsist, it cannot be construed to be directly repugnant and opposed to the 24th Section, but is to be understood as referring to such provisions of the Act only as would in their nature depend upon a state of Peace. The principle involved in the permanency of this Treaty would seem to be, that the Treaty was in substance a recognition of a title to lands on the part of the actual possessors of those lands and their heirs, and that it would be inconsistent with such a recognition for the

possessors at any time to be regarded as Aliens in respect of those lands."

The American Tribunals have adopted a similar rule of interpretation. Thus Mr. Justice Washington, in delivering judgment in a case before the Supreme Court of the United States [60], said, "But we are not inclined to admit the doctrine urged at the Bar, that Treaties become extinguished *ipso facto* by war between the two Governments, unless they should be revived by an express or implied renewal on the return of Peace. Whatever may be the latitude of doctrine laid down by elementary writers on the Law of Nations dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be Treaties of such a nature as to their subject and import, as that War will put an end to them, but where Treaties contemplate a permanent arrangement of Territorial and other National Rights, or which in their terms are meant to provide for the event of an intervening War, it would be against every principle of just interpretation to hold them extinguished by the event of War. If such were the Law, even the Treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

"We think, therefore, that Treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of War as well as of Peace, do not cease on the

[60] The Society for the Propagation of the Gospel in Foreign Parts, v. the Town of Newhaven. Wheaton's Reports, VIII. p. 494.

occurrence of War, but are at most only suspended while it lasts; and unless they are waived by the Parties, or new and repugnant stipulations are made, they revive in their operation at the return of Peace."

Treaties which create a Servitude of Public Law.

§ 245. Martens speaks of Treaties which create a Servitude of Public Law (une servitude du Droit Public) in favour of one Nation within the territory of another. The term *Servitude* is borrowed from the Civil Law of the Romans, where it is used to designate certain forms of *innocent use;* as for instance, a Right of Way across the land of a neighbour. A *Servitude* was distinguished by the Roman Jurists from a *Right*, and in order to convert a *Servitude* into a *Right*, some compact or stipulation to that effect was requisite. "Si quis velit vicino aliquod jus constituere, pactionibus atque stipulationibus id efficere debet [61]." The Right of *innocent use* is only an Imperfect Right, but under certain circumstances a Right of Innocent Use may be likewise a Right of Necessity. Thus the Midchannel of a river may be the territorial boundary between two Nations, whilst neither Nation may be able to gain access by the River to its own ports owing to the set of the current or the force of the wind without passing over portions of the river which belong to the other Nation; or the territory of a Nation may be surrounded by the territory of another Nation, and the former may have no means of access to the open Sea without passing over the Territory of the latter Nation. Thus the Territory of the Swiss Confederation is enclosed on all sides by the Territory of other Nations, so that, until the Treaty of Vienna declared the navigation of the Rhine, amongst the other Great European Rivers, to be free to all Nations, the Swiss Nation had not any

[61] Justiniani Inst. L. II. Tit. II. De Servitutibus.

access to the open Sea, except by passing over the territory of another Nation. Again, a Nation may have some portions of its territory separated from the rest of its territory by the territory of another nation; thus the Rhenish Provinces of Prussia are separated by the territories of other German Powers from the North German and Polish Provinces of Prussia. Under circumstances of this nature a Treaty, which creates a Servitude, in other words, which establishes a Right of Way across the territory of one Nation in favour of another Nation, is held to create an obligation, which may be suspended indeed by the occurrence of War, but which revives on the return of Peace. Klüber has given to the expression *Servitude* [62] a much larger interpretation, so much so, that if his use of the term be correct, it would seem doubtful whether it could be safely maintained, that all Conventions, which create a Servitude of Public Law in favour of one Nation within the territory of another, are perpetual in their nature, and are not extinguished by the event of war. Mr. Wheaton [63] is careful in limiting his own position of law to treaties which create "*a permanent Servitude*," about which there can arise no dispute.

Treaties of Equal and Unequal Alliance.

§ 246. The class of International Compacts which have hitherto been under consideration are Compacts, which constitute obligations between the Contracting Parties absolutely, as between themselves, and without any regard to third Parties. There is another large class which remains to be considered, under which Nations contract obligations towards one another in respect of third Parties, such as Treaties of Alliance, or of Protection, or of Guaranty, or of Subsidy. Treaties of Alliance are subdivided by Grotius

[62] Droit des Gens, §§ 137, 138. [63] Elements, Part III. c. 11. § 9.

into Equal and Unequal Treaties. A Treaty of Alliance upon equal conditions is made for the mutual security of the Contracting Parties, and it may be either limited to defensive purposes against a particular Enemy, in which case it was termed by the Greeks *ἐπιμαχία*, or it may extend to offensive as well as to defensive purposes, and it was then termed by them *συμμαχία*. An equal Treaty of Alliance does not necessarily contain identical conditions for each Party. Vattel draws a distinction between an Equal Treaty and an Equal Alliance. Equal Treaties, he says [64], are those in which the Contracting Parties promise the same things, or things that are equivalent, or finally things that are equitably proportioned, so that the condition of the Parties is equal. Such is, for example, a defensive Alliance, in which the Parties reciprocally stipulate for the same succours. Such is an offensive Alliance, in which it is agreed that each of the Allies shall furnish the same number of vessels, or the same number of troops, of cavalry and of infantry, or an equivalent in vessels, in troops, in artillery or in money. Such is also a League in which the *Quota Pars* of each of the Allies is regulated in proportion to the interest which he takes or may have in the design of the League. Thus the Emperor of the Germans and the King of England, in order to induce the States-General of the United Provinces to accede to the Treaty of Vienna (March 10, 1731), consented that the Republic should only promise to her Allies the assistance of four thousand foot and one thousand horse, though they engaged each to furnish it, in case it should be attacked, with eight thousand infantry and four thousand cavalry. Further, there may be included in this class Treaties, which stipulate that the

[64] Droit des Gens, L. II. § 172.

Allies shall make common cause with one another, and act with all their forces ; although their forces may be in fact unequal, they are willing in this instance to consider them as equal. *Equal Alliances* on the other hand, according to Vattel, are those in which an Equal treats with an Equal, no distinction of dignity being made between the contracting Parties, whilst *Unequal Alliances* are those which make a difference in the dignity of the Contracting Parties. It may well happen indeed that a Treaty of Equal Alliance is not at the same time an Equal Treaty ; but it can rarely happen that a Treaty of Unequal Alliance is not at the same time an Unequal Treaty. Thus a powerful Monarch wishing to engage a weaker State in his interest, offers to it very advantageous conditions, and promises gratuitous succours, or succours disproportionate to those for which he stipulates in return, whilst he claims at the same time a superiority of dignity, and exacts proportionate respect from his Ally. It is this last condition which renders the Alliance unequal ; without such a condition the Treaty would have been unequal, but the Alliance would have been equal.

Unequal Alliances are subdivided into those which impair the Independence of one of the Contracting Parties, and those which do not impair it. The Independence of a Nation is impaired, when it gives up any of its Natural Rights, or consents to use them in absolute subordination to the will of another Nation. Thus a Nation may agree with another Nation not to make peace with a common Enemy or not to make war upon a third Party, and it does not thereby give up its Independence, but covenants to exercise a Right incident to its Independence under certain restrictions in favour of its Ally. But if a Nation agrees not to

enter into a Treaty of any kind with any third Party without the consent of its Ally, the former contracts an Unequal Alliance *cum diminutione imperii*, for it deprives itself absolutely of a power, the possession of which is a condition *sine qua non* of National Independence.

Treaties of Protection.

§ 247. Treaties of Protection are Treaties in the nature of Unequal Alliance. They were in frequent use amongst the Greeks and Romans, and the expression *in fidem se tradere* is opposed by Latin authors to the phrase *in servitutem se tradere*. Thus Phæneas, the envoy of the Ætolians, announced to the Consul Atilius that the object of his Mission was to conclude a Treaty of Protection, and not a Treaty of Subjection to the Romans. "Non in servitutem, sed in fidem tuam nos tradimus, et certum habeo te imprudentia labi, qui nobis imperes [65]." So the Numidians were considered to have placed themselves under Treaty in a relation to the Romans analogous to that in which Clients stood towards their Patrons. "Quorum in fide et in clientela Regnum (Numidia) erat [66]." "As Private Protection," says Grotius [67], "took not away Personal liberty, so Public Protection does not take away Civil liberty, which cannot be conceived without Sovereignty." That the maintenance of National Independence on both sides is not inconsistent with a Treaty of Protection between two States is established by the practice of Nations in modern times. Thus the City of Danzic, with a territorial radius of two leagues, was placed by the Treaty of Tilsit [68] under the Protection of the Kings of Prussia

[65] Titi Livii Hist. L. XXXVI. c. 28.

[66] Julii Flori L. III. c. 1. n. 3.

[67] De Jure B. et P., L. I. c. 3. § 21.

[68] Treaty between France and Russia, 7 July, 1807. Martens, Recueil, VIII. p. 639.

and of Saxony, without prejudice to its Independence; so the free City of Cracow was declared by the Final Act of the Congress of Vienna, to be a Free Independent and strictly Neutral City under the protection of Prussia, Austria, and Russia. The form, under which Treaties of Protection may be concluded, varies indefinitely. Modern Treaties of Protection, for the most part, provide that the Protecting Power shall keep garrison within the Protected State, and this may be considered as the characteristic feature of a Treaty of Protection as distinguished from a Treaty of Unequal Alliance. Thus by the Treaty of Turin (Nov. 7, 1817) [69], concluded between the King of Sardinia and the Prince of Monaco, it was stipulated that the King of Sardinia should always maintain a garrison of five hundred men at his own expense in Monaco. The King of Sardinia also undertook to defend the Prince of Monaco against foreign enemies, to include his name in Treaties of Peace with Foreign Powers, and to allow him to use the Royal Standard of Sardinia in time of War.

Treaties of Subsidy.

§ 248. Treaties of Subsidy are Treaties under which a Power, which does not take part in a war as a Principal, furnishes a limited succour to another power, as an Auxiliary. Treaties of General Alliance are to be distinguished from Treaties of Subsidy. When one State stipulates to furnish to another a limited succour of troops in return for an annual payment of money, without any provision in contemplation of an eventual engagement in general hostilities, such a Treaty does not render the State, which furnishes such limited succour, an associate in any war that the other State may undertake. The payment, which the Power, that receives such limited succour,

[69] Martens, Nouveau Supplément, II. p. 243.

makes in return, is called a *Subsidy*, and it was at one time the practice both of France and Great Britain to have recourse to Treaties of Subsidy with certain German Powers in order to procure troops to carry on their wars. Of this kind was the treaty of Subsidy concluded between the King of Great Britain and the Landgrave of Hesse-Darmstadt (Oct. 5, 1793) [70], under which the latter Power undertook to furnish to the former for three years a corps of 3000 troops of all arms for service in any part of Europe, in consideration of an annual Subsidy. Under the head of Treaties of Subsidy may be classed the Conventions, which formerly existed between the Helvetic Cantons and various European Powers, under which the former furnished Swiss Regiments for the service of the latter Powers. These Conventions are sometimes called Military Capitulations, and such is the name given to a Convention, which Spain concluded at Berne (Aug. 2, 1804) [71] with the Helvetic Confederation for the continuous services of five Regiments during the space of thirty years. There is another use of the phrase *Treaty of Subsidy* which must not be overlooked. A Treaty of Subsidy becomes virtually a Treaty of Alliance, when one Power enters into an agreement with another Power, that the latter shall furnish troops to fight against a Third Power, on condition of the former finding money for the maintenance of them. A Treaty of Subsidy for such an object is sometimes incorporated with a Treaty of Alliance. Thus we have a Convention of Alliance and Subsidy concluded at Reichenbach (June 15,

[70] Martens, Recueil, V. p. 524.

[71] Martens, Recueil, VIII. p. 228. Capitulations of this kind are forbidden under the present Constitution of the Swiss Confederation. "Il ne peut-être conclu de capitulations militaires." Art. XI.

1813)[72], between Great Britain, Russia, and Prussia, under which the former Power engaged herself to furnish 1,133,334 pounds sterling, before the expiration of twelve months, and to maintain the Russian fleet, which was at such time in the Ports of Great Britain, at an estimated expenditure of 550,000 pounds sterling. A Subsidy is sometimes an alternative provision in a Treaty of Alliance. Thus under the Treaty of Alliance concluded at Berlin[73] (April 15, 1788), between the States-General of the United Provinces and Prussia, the former Power had the alternative of furnishing money, if it could not furnish troops. A separate Convention of Subsidy is sometimes agreed to as supplemental to a Military Convention; this practice is generally observed when all the parties to the Military Convention are not at the same time parties to the Convention of Subsidy. Thus after a Military Convention had been concluded between Sardinia, Great Britain, and France at Turin (Jan. 26, 1855), a supplemental Treaty of Subsidy was concluded between Sardinia and Great Britain[74], under which the Queen of Great Britain undertook to recommend to her Parliament to advance by way of loan to the King of Sardinia the sum of one million pounds sterling. The King of Sardinia had agreed, under the previous Military Convention, to furnish for the service of the war against Russia a corps of 15,000 men; and France and Great Britain had in return guaranteed the integrity of the dominions of the King of Sardinia, and engaged themselves to defend them against every attack pending the war.

Treaties of Guaranty.

§ 249. Treaties of Guaranty are Compacts under

[72] Martens, N. R. I. p. 568. [73] Martens, Recueil, IV. p. 379.
[74] Martens, N. R. Gén. XV. p. 613.

which a State promises to aid another State, if it should be disturbed in the enjoyment of a Conventional Right as distinguished from a Natural Right. When a Treaty of Peace is concluded, which proceeds upon a settlement of territorial boundary, it is not unfrequent to invoke the Guaranty of one or more powerful States to maintain the weaker of the two contracting Parties in the State of Possession established by the Treaty. "When those," says Vattel, "who make a Treaty of Peace or any other Treaty are not perfectly easy with respect to its observance, they require the Guaranty of a powerful Sovereign. The Guarantor promises to maintain the conditions of the Treaty and to cause it to be observed. As he may find himself obliged to make use of force against the party who attempts to violate his promises, it is an engagement that no Sovereign ought to enter into lightly and without good reason. Princes indeed seldom enter into it, unless when they have an indirect interest in the observance of the Treaty, or are induced by particular relations of friendship. The Guaranty may be promised equally to all the contracting parties, to some of them, or even to one of them alone, but it is commonly promised to all in general. It may also happen when several Sovereigns enter into a common alliance that they all reciprocally pledge themselves to each other, as Guarantors for its observance. The Guaranty is a kind of Treaty by which assistance and succour are promised to some one, in case he has need of them, in order to compel a faithless Ally to fulfil his engagements[75]."

"The term Guaranty," continues the same writer, "is often taken in a sense somewhat different from

[75] Droit des Gens, L. II. c. 15. § 235.

that we have given to it. For instance, most of the Powers of Europe guaranteed the Act, by which Charles VI had regulated the Succession to his dominions, and Sovereigns sometimes reciprocally guarantee their respective States. But we should rather denominate those transactions Treaties of Alliance for the purpose, in the former case, of maintaining the Rule of Succession under the Pragmatic Sanction; and in the latter, of supporting the State of Possession of a Friendly Power[76]."

To the same effect Klüber[77] writes, "L'une des plus usitées des Conventions, dont, nous nous occupons, est la Garantie proprement dite, par laquelle un État promet de prêter secours à un autre État, dans le cas où celui-ci serait lésé ou menacé d'un préjudice dans l'exercice de Droits déterminés par le fait d'une tierce puissance. La Garantie est toujours promise par rapport à une tierce puissance, de la part de laquelle il pourrait être porté préjudice à des droits acquis." . . . § 158. "Lorsque la Garantie est destinée à assurer l'inviolabilité d'un Traité, elle forme toujours une obligation et un Traité accessoire (pactum accessorium), même quand elle ferait partie de l'acte principal." . . . § 159. "Les Garanties sont générales ou spéciales, selon que tous les droits d'une espèce déterminée, ou toutes les possessions d'un État, ou toutes les stipulations contenues dans un Traité, ou bien une partie seulement de ces droits, possessions, ou stipulations, sont garantis. Tantôt elles sont stipulées pour toujours, tantôt pour un temps déterminé. Dans le cas d'une lésion du droit garanti, ne fût elle même qu'imminente encore, le Garant, sur l'invitation qui doit lui en être faite, est tenu de prêter le secours promis, à condition

[76] Droit des Gens, L. II. § 228. [77] Droit des Gens, §§ 157–159.

cependant que le provoquant en garantie ait lui-même le droit de se défendre, ou de se faire raison à soi-même, et toujours sans porter préjudice aux droits d'aucun tiers (salvo jure tertii). Le garant n'a ni droit ni obligation de faire davantage que de prêter l'assistance promise."

An International Guaranty is thus strictly concerned with *International Rights*, even where the subject of the Guaranty may be a Rule of Succession, as in the case of the Pragmatic Sanction of Charles VI, or the undisturbed possession of Territory, as in the case of the Germanic Confederation, equally as when it is given by a third party to a Treaty of Peace, such as the Guaranty of his Britannic Majesty to the Treaty of Peace made at Utrecht in 1715 between the Crowns of Spain and Portugal. For instance, when Foreign Powers were invited to guaranty the Pragmatic Sanction, it was not intended that such Guaranty should affect the Political Independence of the Austrian Crown, so as to limit in any way its right to rescind or modify the Rule of Succession; but that the Guarantying Powers should support the daughter of Charles VI against any Foreign Power, which should attempt in its character of a Foreign Power to disturb her in the peaceable enjoyment of the Rights secured to her by the Pragmatic Sanction.

No rule of International Law is more clear than that a Convention of Guaranty *nude and absolute* does not apply to the case of Political changes. If, for instance, Denmark had guaranteed to the Princess Anne of England the undisturbed possession of the British throne upon the death of William III, *contra quoscunque*, no *casus fœderis* would have arisen, if the Highlanders of Scotland had attempted to restore

the Crown to the son of James II; but if Louis XIV or Philip V, as Foreign Powers, had sent an army to cooperate with the insurgents in depriving the Princess Anne of the Succession, there would have been at once an undeniable *Casus Fœderis.* Even an expression so indefinite as *contra quoscunque* is limited by the nature of the subject matter; it may apply to the slightest International interference, from whatever quarter it may be threatened, but even a Civil War will not extend its operation to Political troubles.

Such an expression is found in the eleventh article of the Treaty of Gottorp of 26th June, 1715, concluded between the King of Great Britain, as Duke of Brunswick-Luneburg (Elector of Hanover), and King Frederick IV of Denmark, by which "his Royal Majesty in Great Britain engages and obliges himself, for his heirs and successors, to maintain King Frederic IV, his heirs and successors, in the occupation, enjoyment, and possession of the Ducal part of the Duchy of Schleswig *contra quoscunque* in the most effective manner, and to guaranty assistance; and to that end on every occasion, when need shall require it and it shall be demanded of His Royal Majesty in Great Britain on the part of the King of Denmark, within six weeks *a die requisitionis* to furnish without fail the assistance determined in the next preceding article, and otherwise, according to the exigency of circumstances, to assist with all his might and all his power."

In consideration of this Guaranty Denmark gave up to the Elector of Hanover the Duchies of Bremen and Verden which she had conquered from Sweden in 1712, and which Hanover has retained down to the present day; and Hanover on her part united her

forces with those of Denmark, and thereby contributed to bring about the Treaty of Stockholm, of June 3, 1720, and which Denmark would not consent to ratify, until she had obtained the separate acts of Guaranty on the part of the Kings of Great Britain and France on the 26th July and 8th August of the same year [78].

A Guaranty, being given in favour of one of the Contracting Parties to a Territorial settlement, does not authorise the Guarantying Power to interfere in the enforcement of the settlement, unless his interference should be invoked. If the Contracting Parties choose to vary the settlement, they have a right to do so, and the Guarantying Power cannot oppose it; the obligation upon the latter to support the Party, who should complain of the infringement of the settlement, does not carry with it a right to interfere without invitation; for the Guaranty was not given for the advantage of the Guarantying Power, otherwise it would have been a Principal in the Contract. Vattel [79] observes that it is of great importance to keep in mind the distinction in this respect between a Treaty of Guaranty and a Treaty of Alliance, lest under colour of a Guaranty, a powerful Nation should claim to be arbiter of the affairs of its neighbours, and pretend to give law to them.

Sir Robert Phillimore [80] seems to doubt the soundness of the position, that a *Convention of Guaranty* does not apply to Political changes, and lays stress

[78] Twiss on the Relations of the Duchies of Schleswig and Holstein to the Crown of Denmark and the Germanic Confederation, p. 124.

[79] Droit des Gens, L. II. c. 16. § 286.

[80] Commentaries on International Law, T. II. § 57.

upon a passage in Vattel [81], in which that writer says, "An Ally ought doubtless to be defended against every invasion, against every foreign violence, and even against his rebellious Subjects." It may however well happen that Sovereign Princes are at liberty to enter into Treaties of Alliance for mutual assistance against their own Subjects, if they should revolt; as, for instance, the Sovereign Princes and Free Cities of Germany as members of the late Germanic Confederation entered into a League [82], under which they bound themselves to intervene, if the Subjects of any Confederate State should revolt, and yet it might consist with Reason, that a Convention of nude and absolute Guaranty, *contra quoscunque*, would not extend to Political Troubles. Again, the second Treaty of Barrier [83], (Jan. 30, 1713,) under which the Dutch engaged themselves to give aid to Queen Anne and her Successors to the British Crown, being Protestants, according to the order of Succession as established by the Parliament of England, against all such States and Persons as should attempt by *open war*, or by *secret conspiracy*, or by *treason* to set aside the Succession so established, is relieved of all ambiguity by its very speciality; for it is not a Treaty of nude and absolute Guaranty, *contra quoscunque*, but a specific Treaty of Aid and Succour, (ipsi Reginæ opitulaturos ad pugnandum pro jure Successionis ad Coronam,) promised to the Queen herself, and after her death to her lawful heirs, under circumstances specified either of Foreign war, or of Civil tumult.

[81] Vattel, L. II. c. 12. § 197.

[82] Final Act of the Germanic Confederation. Art. XXV, and XXVI. Martens, N. R. V. p. 489.

[83] Schmauss, Corpus Jur. p. 1287. Sir Robert Phillimore refers to this Treaty, which Lord Liverpool terms a Defensive Alliance.

The Treaty concluded in London [84] on May 7, 1832, between France, Great Britain and Russia on one part, and Bavaria on the other part, provides that Greece, under the Sovereignty of Prince Otho, and under the *Guaranty* of the three Courts, should form a Monarchical and Independent State. It is obvious, that such a Guaranty cannot be construed as a Guaranty to King Otho against a Rebellion of his Subjects, but only as a Guaranty of the Independence of his Throne; which is a matter strictly within the province of an International Guaranty.

Treaties of Neutrality.

§ 250. Treaties of Neutrality are Treaties under which either the absolute Neutrality of a Nation is agreed upon, or particular acts of Neutrality on its part are covenanted for. The Swiss Confederation and the Kingdom of Belgium are States, of which the absolute Neutrality is made a matter of Treaty-stipulation between all the Great Powers of Europe. Accordingly, no State is entitled to demand of either of these States under the General Law of Nations, that it should allow a free passage to its troops for belligerent purposes through its Territory. In the case of Nations which have agreed to observe particular acts of Neutrality, such obligations have reference for the most part to Rights under the General Law of Nations, which a Neutral Power has an option to enforce or not, as it shall think fit. Such, for instance, were the provisions of the Treaty [85] of Amity, Commerce, and Navigation, concluded between Great Britain and the United States of America Nov. 19, 1794, but not ratified by the latter Power until Oct. 28, 1795. By the Twenty-fifth Article of this Treaty it was provided, "that neither of the said Parties

[84] Martens, N. Recueil, X. p. 550.
[85] Martens, Recueil, V. p. 68.

shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannon shot of the Coast, nor in any of the Bays, Ports, or Rivers of their Territory by ships of war, or others having commission from any Prince, Republic, or State whatever. But in case it should so happen, the Party, whose Territorial Rights shall thus have been violated, shall use its utmost endeavours to obtain from the offending Party, full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war, or merchant vessels."

There have been Treaties of Armed Neutrality between Neutral States pending war between belligerent Powers, the object of which has been to give mutual aid to each other in maintaining the Rights of Neutrals under the General Law of Nations. These and other matters touching Neutrality are more fully discussed in their appropriate place in a subsequent volume, in connection with the Rights and Duties of Nations in time of War.

Conclusion and Ratification of Treaties.

§ 251. There are certain International Compacts or Conventions which are distinguishable from Treaties (Fœdera) properly so called; being concluded not in virtue of an express delegation of Full Powers from a Nation to that purpose, but in virtue of an implied delegation of Full Powers, as incidental to an Official Station. Thus the Commander of an army has an implied delegation of Full Powers to suspend or limit the operation of hostilities by means of Truces for the suspension of arms, of Cartels for the exchange of prisoners, and of Capitulations for the surrender of troops or fortresses. Conventions for such purposes do not require any Ratification on the part of the Supreme Power of the State. It is otherwise, however, with regard to a definitive Treaty of Peace.

A definitive Treaty of Peace, according to the usage of Nations, requires Ratification, and although every Treaty is operative from the date of its signature, unless it contains an express provision to the contrary, yet its operation is suspended until the exchange of Ratifications shall have taken place, whereupon the Treaty acquires validity from the date of its signature. There is, however, an exception to the rule of a Treaty taking effect from the date of its signature in regard to treaties stipulating for the Cession of Territory. In the case of such Treaties they only take full effect upon the actual Cession (traditio) of the Territory itself. Thus the National Character of a Territory for commercial purposes continues unaltered, notwithstanding it may have been ceded by Treaty, as long as it continues in the actual possession of the State which has agreed to cede it[86]. Upon the actual change of the State of Possession, the National Character of the inhabitants undergoes a corresponding change. It may happen after a Treaty has been signed by the Plenipotentiary of a Nation, that grave circumstances occur, under which the provisions of the Treaty may be likely to have a prejudicial effect upon the interests of that Nation, which were not known at the time of signature. Under such circumstances the Sovereign Power of a Nation is by Usage justified in declining to ratify the Treaty. Thus the King of the Netherlands refused in 1841 to ratify a Treaty for the incorporation of Luxembourg into the Customs' Union of the Germanic States on the ground of the injurious effects that it was likely to exercise upon the commercial interests of his subjects, which had been brought to his knowledge subsequently to the

[86] The Fama, 5 Robinson, p. 106.

signature of the Treaty. So the King of the French declined in 1841 to ratify the Quadruple Treaty for the suppression of the Slave Trade on account of the objections raised against it in the French Chambers. So Great Britain declined in 1859 to ratify a Treaty which her Minister Plenipotentiary had concluded with Nicaragua, and Nicaragua in the same year declined to ratify her Convention with Great Britain for the settlement of the Grey Town and Mosquito Question. If, however, there should be an express provision that the preliminary engagements shall take effect immediately without waiting for the exchange of Ratifications, such a Treaty will be an exception to the rule. We have an instance of such a Treaty in the Convention concluded at London[87] (15 July, 1840) for the pacification of the Levant between Great Britain, Austria, Prussia, and Russia, on the one part, and the Ottoman Porte on the other, to which there was annexed a Reserved Protocol of the same date, providing that the preliminary measures, mentioned in the Second Article of the Convention, should be put into execution immediately (tout de suite) and without waiting for the exchange of Ratifications.

Termination and Renewal.

§ 252. Treaties properly so called, the engagements of which imply a state of Amity between the Contracting Parties, cease to operate if War supervenes, unless there are express stipulations to the contrary. It is usual on the signature of a Treaty of Peace for Nations to renew expressly their previous Treaties, if they intend that any of them should become once more operative. Great Britain in practice admits of no exception to the rule that all Treaties, as such, are put an end to by a subsequent war between the Con-

[87] Martens, N. R. Gén. I. p. 156.

tracting Parties[88]. It was accordingly the practice of the European Powers before the French Revolution of 1789, on the conclusion of every war, which supervened upon the Treaty of Utrecht, to renew and confirm that Treaty, under which the distribution of Territory amongst the principal European States had been settled with the view of securing an European Equilibrium.

In the Treaty of Paris (30 March, 1856) there occurs a provision which is equivalent in its effect to the renewal of previous Treaties, under which it has been agreed that, until the Treaties or Conventions which existed before the war between the Belligerent Powers shall have been renewed or replaced by new arrangements, the commercial intercourse between the subjects of the various Powers shall be reciprocally maintained on the same footing as before the war, and their subjects in all other matters shall be respectively treated upon the footing of the most favoured Nation[89]. In the Treaty of Zurich, concluded between France, Austria, and Sardinia[90] (10 Nov. 1859), all the Treaties and Conventions concluded between Austria and Sardinia, which were in force before April 1, 1859, are confirmed, so far as the Treaty itself does not derogate from them, but the Two Powers undertake to submit in the course of a year those Treaties and Conventions to a General Revision, in order to introduce, by common accord, the modifications which may be thought conformable to the interests of both countries. There is, however, no corresponding provision either in this Treaty, or in the separate Treaty of

[88] Lord Bathurst's Letter of Oct. 30, 1815. Twiss' Oregon Question, p. 188.

[89] Art. XXXI. Martens, N. R. Gén. XV. p. 780.

[90] Ibid. XVI. Part II. p. 536.

Peace of the same date and place concluded between France and Austria, whereby the Treaties and Conventions between those Two Powers, if any such were in force before April 1st, 1859[91], are confirmed.

[91] Recueil des Traités et Conventions conclus par l'Autriche avec les Puissances Etrangères, depuis 1763 jusqu'à nos jours, par Léopold Neumann, Leipzig, 1855–59. This collection of Treaties contains special Treaties of Commerce and Navigation, of Extra-Tradition, and of Postal Service, concluded between France and Austria, determinable every Five Years at the pleasure of either Party.

CHAPTER XIV.

CAPITULATIONS OF THE OTTOMAN PORTE.

Early Phœnician and Greek Factories in Egypt—An Amalphitan Factory at Alexandria in the ninth century—Pisan Capitulation of 1173—Mahommedan Factory at Canton in the ninth century—System of personal Laws throughout Europe—National Autonomy allowed to the Mahommedans in Constantinople by the Emperors of the East—Analogous privileges allowed by the Ottomans to the Venetians in Constantinople in 1454—National Autonomy secured to the French by the Treaty of 1535, confirmed by Treaties of 1740 and 1861—Privileges assured to English subjects in the Ottoman dominions in 1580, confirmed by Treaties of 1675 and 1861—Similar privileges granted to the Dutch in 1612, confirmed by Treaty of 1862—Austrian Capitulations—Treaty of Passarowitz of 1718, confirmed to Austria-Hungary by Treaty of 22 May, 1862—Prussian Capitulations of 1761, confirmed by Treaty of 20 March, 1862—Swedish Capitulations of 1737, confirmed by Treaty of 5 March, 1862—Danish Capitulations of 1756, confirmed by Treaties of 1841 and 1862—Spanish Capitulations of 1782, confirmed by Treaty of 13 March, 1862—Russian Capitulations of 1774 and of 1783, confirmed by Treaty of 3 February, 1862—Capitulations with the Kingdom of Italy of 1861—Belgian Capitulations of 1838 and of 1840, confirmed by Treaty of 1861—Portuguese Capitulations of 1843, confirmed by Treaty of 1868—Greek Capitulations of 1855—Capitulations with the United States of America of 1830, confirmed by Treaty of 25 February, 1862—Treaty with the Empire of Brazil of 5 February, 1858—Origin of the term Capitulations—Covenant of Mahomet, the Messenger of God, with the Christians, A.D. 625—Capitulation of the Kaliph Omar, A.D. 636—Treaty of Paris of 1856—A special Platform of Conventional Law between Christendom and Islam—Adherence of the Porte to the First Protocol of the Conferences of London of 1871.

Early Phœnician and Greek Factories in Egypt.

§ 253. In the preceding Chapter on the Right of Treaty we have briefly touched upon a certain class of Treaties, that have been found to be highly con-

venient, if not indispensable for the maintenance of commercial intercourse between nations, which recognise neither the ties of a common Religion nor the sanctions of a common Law. Treaties of this character are not of novel device, as their origin may be traced back to a period, when race or nationality rather than territory was the basis of a community of law. An identity of religious worship seems to have been in the earliest times a necessary condition of international amity. The barbarian was outside the pale of religion, but the stranger was entitled to hospitality, if he worshipped the same gods. On the other hand, the necessities of international commerce gave rise by degrees to religious tolerance, under which there grew up a certain international comity, and merchants were permitted to establish factories in foreign Countries without any intention of settling there permanently. Thus we find that the merchants of Tyre, who were strangers to the religion of Egypt, were nevertheless permitted in the twelfth century before Christ to establish trading factories in three different cities on the Tanitic branch of the Nile, where they were allowed the privilege of living under their own laws, and of worshipping according to their own religious rites. Two centuries later we meet with the legend of Iphigenia, according to which the virgin daughter of Agamemnon, the leader of the Greek host, was transported by the goddess Artemis to the shores of the Black Sea, there to become the priestess of a Greek temple, in which her countrymen, whom commerce attracted to the Crimea, might henceforth worship according to their own religious rites. The Greeks from this time gradually acquired the command of the corn trade of the Black Sea, and recruited their mercantile fleets with the

best sailors of the Ægean. In alluding to these two facts we are travelling beyond the limits of strictly historical ground; but the horizon becomes more clear as it becomes more extensive, and we are within the limits of authentic Greek history, when Herodotus steps upon the scene, at which time the Greeks were beginning to participate in the vast trade with Egypt, which had from ancient time been engrossed by the merchants of Tyre. The importance of the Phœnician factories in Egypt had begun to decline after Pharaoh Necho lost his possessions in Syria; and his immediate successor, King Amasis, found himself constrained to adopt a change in the foreign policy of Egypt, and to seek in an alliance with Greece a support against the encroachment of the growing Persian Empire. It was with this motive that he invited the merchants of Hellas to establish a factory on the right bank of the Canopic branch of the Nile, where they might live as a distinct community under their own laws and worshipping their own gods. The Greeks themselves gave to this factory the name of Naucratis, and the remains of the town which grew up around the factory, may be traced in the present day in the village of Desük, on the right bank of what is now called the Rosetta arm of the River, where the stream is of considerable width.

The Persians, under Cambyses, shortly after the death of Amasis, became the masters of Egypt, and the descendants of Amasis during two centuries endeavouring in vain with the aid of Greek Auxiliaries to shake off the Persian yoke, against which they attempted an unsuccessful revolt at the time when Herodotus was travelling in Egypt. It is upon his testimony that we may assume that the privi-

leged commerce of the Greeks at Naucratis was maintained without any great diminutions during that troubled period; and it was not until the *raison d'être* of a Greek factory on the Canopic branch of the Nile had ceased upon the conquest of Egypt by Alexander the Great, and the founding of the neighbouring City of Alexandria, that Naucratis disappears from history, having been superseded by the greater facilities for foreign trade which Alexandria supplied. It had been already observed in the time of Herodotus, that the vast deposits of the Nile were carried eastward by the set of the current of the Mediterranean Sea, and were gradually silting up the mouths of the river; and it was doubtless a knowledge of this circumstance that led Alexander the Great to form his new seaport at the western extremity of the Coast of the Delta.

An Amalphitan Factory at Alexandria in the ninth century.

§ 254. Twelve centuries passed away after the death of Alexander the Great before an occasion arose in Egypt for the admission of foreign merchants to the privilege of a trading factory under magistrates of their own nationality. Many writers have considered the Treaties which the Emperor Charlemagne concluded with the Sultan Haroun al Raschid in the ninth century, under which France claims to exercise a guardianship over the Holy Places in Jerusalem, to be the true starting-point of the Jurisdiction exercised in the present day by European Consuls in the Levant. This may be a probable opinion as regards Syria and the Holy Land, but as regards Egypt the merchants of Amalphi in Italy are with good reason reputed to have obtained from the Caliphs of Egypt towards the end of the ninth century the privilege of trading at Alexandria under a Consul of their own nationality,

and to have been the first Christian merchants to whom such a privilege was conceded. No copy however has been preserved of the text of such a privilege in favour of the Amalphitans[1], and the earliest text known to exist of any so-called Capitulations is a text of which the preservation is vouched by Gatteschi[2], but it is not to be found in the body of Ottoman International Law, published by Aristarchi Bey in 1875. The text in question is that of a treaty concluded in 1173 between Saladin, Sultan of Egypt, and the Republic of Pisa before Saladin accomplished the conquest of the Latin Kingdom of Jerusalem.

Pisan Capitulation of 1173.

There is no improbability in the tradition that the Amalphitans obtained the privilege of a factory at Alexandria in the latter part of the ninth century, seeing that the Arab merchants of Egypt had themselves obtained in the earlier part of that century the privilege of a factory at Kanfou (Canton) within the Chinese Empire, where they were permitted to live under a Mahommedan Kadi, and to have their disputes settled by him in accordance with Mahommedan law. Of this fact we have a perfectly trustworthy record in the narrative of a famous Arab historian, Ali Abou'l Hassan Mas'oudy, who died in Egypt A.D. 956[3].

Mahommedan Factory at Canton in the ninth century.

[1] The State Records of Amalphi were destroyed by the Pisans when they sacked Amalphi in 1137, but there are private records of voyages made to Egypt by Amalphitan citizens in the year 978, and the Amalphitans obtained through the intercession of the Kaliphs of Egypt the privilege of building a church in Jerusalem, A.D. 1020, and a hospital, of which the brethren ultimately became the nucleus of the Order of the Knights Hospitallers of Jerusalem.

[2] Manuale di Diritto Pubblico e Privato Ottomano, p. 1.

[3] The MS. of this narrative is preserved in the Bibliothèque Nationale in Paris. It was translated into French by Eusebius Renaudot in 1718, and subsequently into English in 1735.

System of Personal Laws throughout Europe.

§ 255. Meanwhile the various races of Western Europe, after the breaking up of the Roman Empire of the West, had come to live under a system of personal laws. The change originated in Spain after the conquest of that country by the Visigoths in the fifth century after Christ. It was followed in Italy, where, to use the language of Cassiodorus, the famous Calabrian secretary of King Theodoric the Great, who founded the Kingdom of the Ostrogoths in Italy (453–466), the Roman was a judge for the Roman and the Goth for the Goth, and under a diversity of judges justice was equally administered to all. The mercantile communities were no exception to this great revolution in the system of European Law, and as the Roman Law fell into desuetude, local customs grew up in the chief commercial cities of Spain and of Italy, which came to be regarded by the citizens as of paramount obligation, so that the saying became general "ubi consuetudo loquitur, lex tacet." Hence it became of the first importance, as their merchants were required to observe the good custom of their fellow-citizens, even when they were commorant in a foreign country, that they should obtain the privilege of living, when abroad, under their own magistrates, who could settle their disputes according to their own good usages. We find accordingly that it was thought to be no disparagement to the Sovereignty of the Latin Kings of Jerusalem that they should allow in the eleventh century to the Genoese in the first instance, and then to the Venetians and the Pisans, and subsequently to the Amalphitans, the privilege of occupying a separate quarter in each of the chief maritime cities of Syria, where they could carry on their commerce under the exclusive jurisdiction of their own magistrates. The institution, however, of

the trading factory was not confined to the ports of the Mediterranean. It had become general on the part of the maritime communities of the North Sea and of the Baltic, and it was for the use of their factories in foreign countries that the great mercantile cities of Northern Europe drew up the various Codes of Mercantile and Maritime Law, of which the texts have been edited with great care and judgment by M. Pardessus in his valuable "Collection de Lois Maritimes antérieures au dixhuitième Siècle." Amongst the most remarkable of these factories was the factory established by the merchants of Wisby at Nowogorod, in Russia, in the twelfth century, where they were allowed to live under their own laws, administered by their own magistrates; and that this was looked upon as a normal condition of international commerce in those days may be inferred from the fact, that in the Latin text of the privilege granted by the Duke of Nowogorod in the thirteenth century to the merchants of Wisby it was stipulated that the merchants of Nowogorod should enjoy the same liberties and rights whenever they came into Gothland [4].

National autonomy allowed to the Mahommedans at Constantinople by the Emperors of the East.

Returning to the shores of the Mediterranean, where, notwithstanding the mutual hatred which the Crusades had engendered between the Christian and the Moslem, the Saracenic conquerors of Asia had granted to the merchants of the Italian Republics the privilege of living in communities apart from the natives of the country, we find that the Christians reciprocated this privilege in favour of the Mahommedans, and that for sixty years before Constantinople passed

[4] Eædem libertates et jura Nogardiensibus cum in Gothlandiam venerint in omnibus impendantur favorabiliter et benignè. Dreyer. De inhumano jure naufragii, p. 172.

under the dominion of the Ottomans, a Mahommedan Community was allowed to reside there under a Kadi, who administered justice to them according to Mahommedan law, and they were further permitted to build a Mosque and to worship therein according to their own religious rites.

Analogous Privileges allowed by the Ottomans to the Venetians at Constantinople in 1454.

It need not therefore excite any surprise that, in the very next year after the Sultan Mahomet II had established the supremacy of the Crescent over the Cross in the ancient capital of the Christian Empire of the East, he should have granted to the merchants, both of Genoa and of Venice, the same privileges of national autonomy which they had enjoyed under the Christian Emperors. The Genoese, for instance, had previously obtained from the Greek Emperors as far back as A.D. 1204 the privilege of exclusively occupying, under their own magistrates, a suburb of Constantinople, from which, as a basis of commercial operations, they had pushed forward their factories along the southern shore of the Black Sea, whilst the Venetians had obtained as far back as A.D. 1060 the privilege of sending magistrates of their own nationality to Constantinople to administer justice to their countrymen both in civil and criminal matters. Further, a golden diploma (bulla aurea) of the Emperor Alexis III, of the date of A.D. 1199, which has been published by Marin[5], had extended to the Venetians the further privilege, that their judges should decide all disputes between citizens of Venice and subjects of the Greek Empire. This enlarged privilege appears to have been enjoyed by the Venetian merchants in the ports of Syria from a still earlier

[5] Storia civile e politica del Commercio de' Veneziani, iii. p. 188. Miltitz, Manuel des Consuls, Tom. I. Appendice No. 4.

period, as may be inferred from a treaty of A.D. 1117, cited by Foscarini[6].

Such then having been the general practice in the Levant, before Constantinople passed under the dominion of the Moslem, it would seem to have been a matter of course that the Christian States of Western Europe, which were anxious to secure to their merchants the continuance of a trade which had hitherto been extremely lucrative, should have sought at the hands of the Ottoman Sultans the renewal of the national autonomy heretofore conceded to them by the Christian Emperors. We find, accordingly, that the Sultan Mahomet II, at the request of the Genoese, renewed to them before the conclusion of the year A.D. 1453 the privileges heretofore enjoyed by their merchants, and in the next following year, A.D. 1454, renewed to the Venetian merchants in like manner their privileges. The text of the Genoese privileges, which are said by Sauli[7] to have been granted under the form of a Firman, or, in other words, of an ordinance under the *tougra* or monogram of the Sultan, has not come down to our time, but the text of the Venetian privileges has been preserved, and it has been usual to describe these privileges, which are in the form of treaty-engagements, by the title of "Capitulations." Whether this title means anything more than "Articles," seeing that the text is divided into "Articles," or "Capita," or whether the word "Capitulations" was the Frank translation of the Arabic term "Soulhh," which means "a truce," will be discussed hereafter, but it cannot well be disputed, that the document

[6] Pardessus, Lois Maritimes, Tom. V. p. 3.

[7] Sauli, Della Colonia dei Genovesi in Galata, Tom. II. l. 3. p. 127.

which contains the Venetian privileges of 1454 is in the nature of a bilateral contract, to which the Sultan Mahmoud Bey and the Seigneurie Ducale de Venise were the signatory parties.

There is no mention of a Consul by name in the Venetian Capitulations of 1454, the clause as to the national autonomy of the Venetian Merchants being of this tenor: Art. 16. "Que la même Seigneurie pût à son gré envoyer à Constantinople *un Bailli* avec sa Suite, suivant l'usage, lequel ait la liberté de régir en civil, et de gouverner, et administrer la justice entre ses Venitiens de toute condition; le Sultan s'engageant de faire en sorte que le Pacha ou Séraskier de la Roumélie accorde toute faveur au dit bailli chaque fois qu'il en sera requis pour faire son office[8]." An important recital in this Article deserves notice from an international point of view, namely, that the privilege accorded to the Venetians of a national autonomy is recognised to be according to usage (selon usage). Although, however, there is no mention of a Consul by name in this Treaty, there is no doubt that Venetian Merchants enjoyed in the same century in the provincial parts of the Ottoman Empire the privilege of living under the jurisdiction of a Consul of their own nationality, inasmuch as in the Capitulations between the Republic of Florence and Kait Bey, the last of the independent Mameluke Sultans of Egypt in 1488, there is an article securing to the Florentine Consuls the same privileges and prerogatives as were then enjoyed by the Venetian Consuls, as well in respect of honour as of jurisdiction[9] (Article XII).

[8] Gatteschi, Manuale di Diritto Ottomano, p. 16; also Aristarchi Bey Droit International Ottoman, Tom. IV. p. 237.

[9] Les Capitulations et la Réforme Judiciaire, par J. C. Aristide Gavillot. Paris, 1875, p. 21.

National autonomy assured to the French by the Treaty of 1535.

§ 256. The independence of the Mameluke Sultans of Egypt ceased in 1517, upon the death of the Sultan el-Ghúri on the battle-field of Dabik, fighting against the army of the Osman Sultan, Selim I. Shortly afterwards Cairo was taken by storm, and Sultan Selim compelled Mutawakkil, the last scion of the family of the Abasside Kaliphs, to convey to him his nominal supremacy, and thereby his title to the office of Kaliph, the spiritual and temporal chief of Islam. Henceforth the Sultans of Constantinople have been supreme in the Levant, and France, in entering into an alliance with the Porte, thought it well to secure for herself, by treaty, a confirmation of the ancient privileges heretofore enjoyed by the Venetians, and to include under her protection the subjects of all the Christian Princes of Europe, with the exception of those of the Emperor Charles V. The document under which the French protection was recognised by the Porte, is in the form of a treaty, concluded A.D. 1535, between King Francis I of France and the Sultan Suleiman II, under the third Article of which it was provided, that "Toutes fois que le Roi mandera à Constantinople ou à Pera ou aux autres lieux de cet Empire un Baïle, comme de présent il tient un Consul à Alexandrie, que les dits Baïle et Consul soient acceptés et entretenus en autorité convenante, de manière que chacun d'eux en son lieu et selon leur foi et loi, sans qu'aucun Juge, Kadi, Soubachi ou autre en empêche, doive et puisse ouir, juger et terminer, tant au civil qu'au criminel, toutes les causes, les procès ou différends, qui naitront entre marchands et autres sujets du Roi." By a further article of this Treaty, power was reserved to his Holiness the Pope, to the King of England the brother and ally

of the King of France, and to the King of Scotland, to accede to the Treaty, if they thought fit, within eight months. The Turkish original of this Treaty is lost, as well as several original Letters-patent or Capitulations between the Porte and France; but a French and Italian text of this Treaty are preserved in the Archives of the French Department of Foreign Affairs, from which we have cited the Third Article as above[10]. There seems, however, to have been another version of this Treaty, the Turkish text of which was known to Mouradjea d'Ohsson[11], and which contains certain stipulations not found in the French text, the fourth of which is of this tenor: "Que les autres Nations Européennes, comme les Anglais, les Catalans, les Ragusais, les Siciliens, les Génois, les Portugais, &c., dont les Gouvernements n'étaient pas liés avec la Porte par des traités d'amitié, pourraient naviguer sous le pavillon français dans toutes les mers et trafiquer sous la protection de la France dans tous les pays de la domination Ottomane;" and the fifth article purports to be as follows: "Que les Français jouiraient du libre exercice de leur culte, et qu'ils feraient garder les Saints Lieux de la Palestine par des religieux Catholiques." Both these Articles deserve attention, as they throw light on the position maintained by France at the present time with regard to the Protectorate asserted by her over the Holy Places in Jerusalem, as well as over vessels sailing under what is called

[10] The French and Italian texts, as preserved in the French Archives, are set out by Charrière in his Négotiations de la France avec le Levant, Paris 1848, Tom. I. p. 293, and the French text is given by Baron de Testa in his Recueil des Traités de la Porte Ottomane, T. I. p. 15.

[11] Tableau Général de l'Empire Ottoman par Mouradjea d'Ohsson. Paris, 1791. Tom. VII. p. 470.

the Flag of Jerusalem, otherwise the Flag of the Latin Convents in Jerusalem. It would be idle to speculate in the present day as to what is the true explanation of the difference between the version which Mouradjea d'Ohsson had before him, and the version of the Treaty of 1535 of which a copy is preserved in the French Archives. The Treaty of 1535, according to the rule of Ottoman law, expired on the death of Suleiman II, and the historian of the Ottoman Empire, Baron von Hammer, enumerates not less than eleven renewals of the Treaty of 1535, which preceded the Treaty of 1740, which latter Treaty continues to be operative in the present day[12]; and each renewal gave occasion for the insertion of fresh Articles. It is a permissible conjecture that the Articles which Mouradjea d'Ohsson enumerates were new articles, possibly added on the renewal of the Treaty of 1535 at the accession of the Sultan Selim II in the year 1566, at which time England had not as yet obtained any special privileges for her own subjects. It is hardly permissible to suggest that there was a discrepancy between the Turkish text and the Italian text of the Treaty of 1535, the Italian on such a supposition having been the original draft, of which the Turkish purported to be a correct translation, both having been signed, the Turkish text by the Reis Effendi, and the Italian text by Jean le Forêt, the French Envoy, inasmuch as the Diplomatic language of the Levant was at that time Italian. Such a discrepancy, however, may have been a fact, inasmuch as a conflict of versions between the Turkish text

[12] These Capitulations were confirmed in 1802 by Article 2 of a Treaty of Peace between the Emperor Napoleon I, and the Sultan Selim III, and still more recently in 1838 and in 1861.

and the American text of a Treaty has been brought to light, in the case of a Treaty concluded at Constantinople so recently as on May 7, 1830, between the Porte and the United States of America. No question arose upon this Treaty before 1868, when the Turkish Authorities claimed criminal jurisdiction over two American citizens in Syria for an alleged offence against the Ottoman Government. The American Minister, Mr. E. Jay Morris, resisted this claim, and cited the Fourth Article of the American text of the Treaty of 1830, which provided that "even when American citizens may have committed an offence they shall not be arrested and put into prison by the local authorities; but they shall be tried by their Minister or Consul, and punished according to their offence." The Ottoman Minister, however, of Foreign Affairs replied, that the American version of the Treaty was incorrect, and that the words, on which the Envoy of the United States relied, were not to be found in the Turkish text; and such proved on a careful examination to be the fact. The United States Government ultimately agreed to abide by the Turkish version of the Treaty[13]. Unfortunately there is no Turkish version of the Treaty of 1535, so that the alleged discrepancy between the two versions of it must continue to be, as heretofore, a diplomatic perplexity. A fact, which gives some support to the authenticity of the Articles cited by Mouradjea d'Ohsson, may deserve notice, namely, that the privilege of sailing under the protection of the French flag and of trading under the protection of the French Consul, was enjoyed by

[13] Treaties and Conventions between the U.S. of America and other Powers since July 4, 1776, Revised edition, Washington Government Printing Office, 1873, pp. 1060–1069.

the merchants of England in accordance with his version of the Articles of 1535, until Queen Elizabeth obtained for her subjects identical privileges with those enjoyed by French subjects.

Privileges assured to English subjects in the Ottoman dominions in 1580.

§ 257. The earliest Capitulations between England and the Ottoman Porte date as far back as the month of June, 1580. They are printed in Hakluyt's collection of the principal navigations and voyages of the English Nation, London, 1598, vol. xi, p. 141. It appears from other diplomatic documents of the same period, which have also been printed by Hakluyt, that in the month of March, 1579, Queen Elizabeth of England obtained from the Sultan Murad III, Imperial Letters, granting to certain of her subjects the same privileges of trading freely in the Ottoman Empire as were enjoyed by the French, the Poles, the Venetians, and the subjects of the Emperor of Germany. Further, in the same Imperial Letters, the Sultan requested, that the like liberties should be granted to his subjects and merchants to come to the Queen's dominions. Queen Elizabeth answered the Sultan's Letters in Latin, and sent his reply on Oct. 25, 1579 from Greenwich, by William Harebone, subsequently accredited to the Porte as her Ambassador. By these Letters the Queen granted to the Sultan's subjects as ample and as large liberties as had been granted to them by the King of the Romans, of France, of Poland, and the Commonwealth of Venice. Thereupon the Sultan accorded a Grant of Privileges in the month of June, 1580[14], to all the subjects of Her Majesty, of which the Latin text is still extant, containing thirty-two Conditions or Articles, which, although

[14] In accordance with this Grant the Turkey Company was incorporated by Charter of Queen Elizabeth in 1581.

they have not been printed in the copy published by the Levant Company in 1820, are entitled to be regarded as the earliest English Capitulations. More extensive privileges were subsequently granted to the English merchants, by successive Sultans in the reigns of King James I and of King Charles I. The Capitulations, however, which are operative in the present day with some modifications, and which in that respect correspond with the French Capitulations of 1740, were accorded by the Sultan Mehemed IV to King Charles II of England in 1675; and it is recited in the preamble of these Capitulations, that the previous Capitulations had been granted to the Queen of the above-mentioned kingdom and to the Kings aforesaid through friendship. Unlike the Treaty of 1535 with France, which was in reality a Treaty of Alliance between France and the Porte, the English Capitulations are drawn up in the form of a Grant of Privileges, confirmatory of previous stipulations; and amongst these Privileges was that of the English Ambassadors being allowed, at their pleasure, to establish Consuls in the ports of Aleppo, Alexandria, Tripoli of Barbary, Tunis, Tripoli of Syria, Scio, Smyrna, and Egypt, who should decide all disputes amongst the English themselves. There was further a most favoured-nation article, in which it was recited that all the Capitulations, Privileges, and Articles, granted to the French, Venetian, and other Princes, who are in amity with the Sublime Porte, are in like manner through favour granted to the English. These Capitulations were confirmed in 1809 and in 1838, and again with modifications in 1861[15].

[15] The Capitulations of 1675 with the subsequent treaties of Commerce confirmatory of them, with certain modifications, have been published in a separate form by Sir E. Hertslet, C.B., the Ar-

§ 258. The Netherlands or Low Countries were the next European State that obtained Capitulations from the Ottoman Porte. The Dutch had been content to trade under the French flag and under the protection of French Consuls, until they obtained, in 1612[16], from the Sultan Ahmed I, Capitulations securing to them equal rights with England and France in respect of their citizens being allowed to trade under their own flag, and to reside in the Ottoman Empire, under the protection of their own Consuls. These Capitulations were confirmed by subsequent Sultans, and were enlarged in 1680 by Sultan Mohammed IV. They contain one or two articles which stipulate for reciprocity, but there does not appear to have been any exchange of Ratifications in 1680 between the Porte and the United Provinces. They have however been recognised and confirmed in recent times by a Treaty of Commerce and Navigation of Feb. 25, 1862[17].

Privileges assured to the Dutch in 1612.

Treaties of 1675 and 1861.

§ 259. Austria, as the heir to the Treaty-Rights and Obligations of the ancient Empire of Germany, may be considered to have succeeded to the privileges which had been granted to the subjects of that Empire, prior to 1580, and which are mentioned in the recitals of the English Capitulations of that year. It is usual, however, to date the earliest Austrian Capitulations from A.D. 1615, when certain Privileges of Commerce were granted to the subjects of the Emperor. These privileges were more formally confirmed by a Treaty of Commerce concluded at Passarowitz[18], between the Emperor and the Porte

Austrian Capitulations of 1615.

chivist of the Foreign Office, in his Treaties and Tariffs of Trade with Turkey, 1875.

[16] Schmauss, Corp. Jur. Gent. Academicum, Tom. II. p. 2266.

[17] British and Foreign State Papers, vol. 52, p. 739.

[18] Schmauss, Tom. II. p. 1716. Dumont, Traités, Tom. VIII. pt. 1. p. 528.

on July 27, 1718. It is this Treaty, confirmed by subsequent treaties during the eighteenth century, which is regarded as containing the Capitulations which govern the political and commercial relations between the Porte and the Austro-Hungarian Empire of the present day, and they have been confirmed by a Treaty of Commerce and Navigation of May 22, 1862.

Prussian Capitulations of 1761.

§ 260. Prussia may next be mentioned as having, in the reign of Frederick the Great, concluded a Treaty of Commerce and friendship with the Sultan Mustapha on March 22, 1761, which is drawn up in Turkish and Italian. This Treaty contains what may be called the Prussian Capitulations, which were confirmed by a Treaty of Friendship, Commerce, and Navigation, between the Porte and Prussia on March 20, 1862 (Br. and For. State Papers, LII. p. 733). The German Empire has adopted these Capitulations as well as the Capitulations of the Hanse Towns of May 28, 1839, which were confirmed by a Treaty between the Hanse Towns and the Porte on Sept. 27, 1862 (Br. and For. State Papers, LII. p. 748).

Swedish Capitulations of 1737.

§ 261. The Swedish Capitulations may be said to date from January 10, 1737, when Articles of Friendship in Turkish and Latin were drawn up between King Frederick I of Sweden and Sultan Mahmoud I. They have been confirmed by a Treaty of Commerce and Navigation of March 5, 1862.

Danish Capitulations of 1756.

The Danish Capitulations were granted by the Sultan Othman III on Oct. 14, 1756. They are drawn up in Arabic and Latin, and place Danish subjects on the same footing of privilege as the subjects of the other Treaty-Powers of Christendom. They have been confirmed by a Treaty of Commerce of March 13, 1862.

Spanish Capitulations of 1782.

The Spanish Capitulations are of still more recent date, and are contained in a Treaty of Peace and

Commerce concluded on Sept. 14, 1782, between King Charles III of Spain and the Sultan Abdul Hamid I. They have been confirmed by a Treaty of Commerce and Navigation concluded on March 13, 1862.

Russian Capitulations of 1783.

The Capitulations between Russia and the Porte date from a Treaty of Commerce concluded at Constantinople on June 10, 1783, between the Empress Catherine II of Russia and the Sultan Abdul Hamid I, although by the Convention of Ainali Kavac of March 10, 1779, explanatory of the previous Treaty of Kutchuk-Kainardji of July 21, 1774, commercial relations between the two Nationalities had been established as nearly as could be upon the basis of the Capitulations accorded to the French and to the English. The provisions of the Treaty of 1783 have been confirmed with certain modifications by a Treaty of Commerce and Navigation concluded on Jan. 22, 1862.

Italian Capitulations of 1740.

The kingdom of Italy has succeeded to the various privileges enumerated in the Capitulations granted by the Porte to the Venetians in 1454 and in 1718, and to the subjects of the Two Sicilies in 1740, subject to such modifications as have been made in them by the Treaty of Commerce and Navigation concluded between the kingdom of Italy and the Porte on July 10, 1861. Under the first article of the latter Treaty it is provided as follows: "All the Treaties, privileges, and immunities which have been conferred on Italian subjects and vessels by the capitulations and antecedent Treaties stipulated between Turkey and the States, which actually form the kingdom of Italy, are confirmed, with the exception of the clauses of the said Treaties and the said Capitulations, which the present Treaty is intended to modify." In virtue

of this provision the kingdom of Italy succeeds to the benefits of the Treaty concluded between the Porte and the Republic of Genoa in 1665, and of the Treaties concluded between Tuscany and the Porte on May 25, 1747, and on February 12, 1833, and to the benefits of the Treaties between Sardinia and the Porte of Oct. 25, 1823, and of Sept. 2, 1839[19].

Belgian Capitulations of 1838.

The Belgian Capitulations are contained in a Treaty between King Leopold I and the Sultan Mahmoud II, signed at Balta Liman on August 3, 1838, and in a further Treaty also signed at Balta Liman on April 30, 1840. The Portuguese Capitulations are contained in a Treaty of Friendship, Commerce, and Navigation concluded in London on March 20, 1843, and in a further Treaty concluded in Paris on Feb. 23, 1868. The Greek Capitulations are contained in a Treaty of Commerce and Navigation signed at Kanlidja on May 27, 1855.

Portuguese Capitulations.

Greek Capitulations.

§ 262. In enumerating the various Treaties above mentioned I have used the term "Capitulation" in a general sense, as descriptive of the entire group of Treaties between the Porte and the Christian States of Europe, under which the privilege of national autonomy is assured to the subjects of the Christian States, whilst resident within the Ottoman Dominions. The term "Capitulation," however, is sometimes used in a narrower sense, and in such sense is technically applied to the privileges accorded either by Treaty or by Grant to the subjects of France, and of England, and of the United Provinces in the sixteenth and seventeenth centuries. Inasmuch, however, as those privileges have been confirmed by more recent Treaties,

[19] Aristarchi Bey quotes the text of the Tuscan and Sardinian Treaties from Martens and De Cussy, Recueil de Traités, III, IV, and V.

and the subjects of other Christian States of Europe are allowed to participate in those privileges in pursuance of the most favoured nation treatment having been assured to them by separate Conventions with the Porte, it seems reasonable to extend the use of the term "Capitulations" to the entire series of such Treaties, and on the same grounds it is permissible to include under the term "Capitulations" the Treaties *in pari materia*, which have been concluded between the Porte and the Principal Christian States of the New World. Amongst these may be mentioned the Articles of a Treaty concluded between the Porte and the United States of America on May 7, 1830, to which allusion has been already made, and a subsequent Treaty concluded on February 25, 1862, between the same Powers, and as regards the Southern Continent of America a Treaty concluded on February 5, 1858, between the Porte and the Empire of Brazil.

United States of America.

Emperor of Brazil.

I have already touched upon the meaning of the term "Capitulation." It is probably of Italian parentage, seeing that the Italian word "Capitulazioni" signifies Covenants or Agreements, and Italian was the language of Diplomacy in the Levant at the time when the Saracen and the Christian first held out to each other the olive branch of peace. But it may be doubted whether the term "Capitulations" came into use before the Treaty of 1535 between France and the Porte. Of its use shortly after the conclusion of that Treaty we have evidence in a despatch from Antoine Rançon, the French Ambassador to the Sultan Sulieman I, addressed to the Constable of France on Sept. 20, 1539, where he speaks of having in his possession "le double des articles et capitulations qu'autrefois, du vivant d'Ibrahim Pacha, le feu De la Forest avait fait et proposé." On the other hand,

Origin of the term Capitulations.

in the earliest grant of privileges[20] accorded by the Sultan Murad III to the subjects of Queen Elizabeth of England the twenty-two articles, in which those privileges are recited, are termed "Conditions," which is the identical phrase made use of in the covenant[21] accorded by Mahomet, the Messenger of God, to the Christians generally in the fourth year of the Hegira (A.D. 625), in which he enjoins his disciples to pay respect to the Judges of the Christians. It may be admitted that the authenticity of the Arabic text of this early privilege which is reported to have been found in the Monastery of Mount Carmel, near the Lebanon, has been impeached. Nevertheless, the document is of high antiquity, and the phrase "conditions" is in perfect harmony with the Scheme of the Koran, under which all mankind outside the House of Islam (Daru-l-Islam) are dwellers in the House of War (Daru-l-Harb), with whom a state of war (Djihad) is of perpetual obligation, except where it has been suspended by a guaranty (Aman) or by a treaty. We find accordingly that in the next most ancient document, which the Greek monks of the Holy Land have preserved as the title-deed of their privileges, and which is commonly described as the Capitulation of the Kaliph Omar[22], the text of the document describes it as a pact or convention given to the patriarch

Covenant of Mahomet, the Messenger of God, A.D. 625.

Capitulations of the Kaliph Omar, A.D. 636.

[20] Hakluyt, The Principal Navigations, &c. London, 1598, vol. ii. p. 137.

[21] An English translation of this document was published by Sir Paul Rycaut in his work "On the present State of the Ottoman Empire," London, 1688. A French text of it will be found in A. de Miltitz's Manuel des Consuls, Tom. I. App. No. 1. Berlin, 1837.

[22] A copy of the original text of this document is contained in a MS. in the Bibliothèque Nationale in Paris, entitled "Histoire de Jérusalem et d'Hébron," fonds de St. Germain-des-Près, No. 100. A French translation of it has been published by Ubicini, Lettres sur la Turquie. 2me Partie. Les Raias. Pièces Justificatives, I.

Sophronius (otherwise Zephyrinus) on the Mount of Olives. Here again the authenticity of the document has been impugned, but its antiquity is indisputable, and it is reasonable to suppose that, if both the so-called Testament of the Prophet Mahomet (A. D. 625), and the so-called Capitulations of the Kaliph Omar (A.D. 636) are not authentic, the monks, who devised them, took care to use language in their recitals, which would not startle their contemporaries by its being at variance with Mahommedan Law, and consequently inadmissible in Mahommedan Courts. The result would seem to be, that it was not essential that the privileges, accorded to the Unbelievers who had sacred books (Kitabi), as distinguished from those who were mere idolaters (Medjous), should be in the form of an Unilateral Grant in the name of the Kaliph, but might be the subject of a treaty or bilateral compact, and the term Capitulations, if originally applied to the articles of a Treaty, came by degrees into use as descriptive of the conditions of a Grant equally as of a Treaty, where under those conditions the Unbeliever was admitted to the benefit of a truce, or a suspension of hostilities. The term "Capitulations," as already mentioned, is considered by some writers to be the equivalent of the Arabic word "Soulhh," a truce, under which the Christian was permitted to enjoy a certain autonomy. We shall probably not err in the opinion of such writers, if we employ the term as a generic term, descriptive of the entire body of grants and treaties, which constitute a kind of international code between Christendom and Islam, and which, if we date its first chapter from the privileges accorded by the Kaliph Haroun el Raschid to the subjects of the Emperor Charlemagne, it has been the work of ten centuries to complete.

Treaty of Paris, 1856.

§ 264. It deserves to be noted that, since the Ottoman Porte has been formally admitted into the European Concert of Public Law by the Treaty of Paris of 1856, it has accorded to each of the Christian States of Europe by express Convention the most favoured nation treatment, thereby recognising a fundamental principle of the Public Law of Christendom, that all the members of the family of Nations are Peers or Equals. Further, by not requiring the renewal of Treaties at the accession of each Sultan it has accepted another principle of the same Public Law, that Treaties may be rightfully concluded in view of perpetual peace and of reciprocal benefits and obligations. It cannot well be denied that the system of Public Law, which has grown up amongst the Nations of Christendom, is a very complex system, the offspring of a community of ideas and of an identical religious faith, and that, where it rests upon unwritten custom, the foundations of that custom are to be traced in the institutions of the Roman Empire. On the other hand, between Islam and Christendom there is no common platform, even of the simplest kind, of consuetudinary law, and the foundations of the unwritten customs of Islam are to be sought for in the legends of Judaism, or in the traditions of the Arab children of the desert. Hence, although Islam has made prodigious strides since the commencement of the present century, in order to qualify herself to participate in the benefits of the European Concert of Public Law, she can only participate in those benefits, whilst the Koran continues to be the source of her civil law as well as the code of her religion, through the channel of Conventional Law. It is from this point of view, that the maintenance of the Capitulations is as indispensable to the Mahommedan as to the Christian

race, if the religious abyss, which separates Islam from Christendom, is to be bridged over. There have been from the earliest times two schools of opinion amongst the authorised expounders of the Koran, like the opposite sects of Proculians and Sabinians amongst the lawyers of Imperial Rome, the one school adhering closely to the letter of the Koran, the other accommodating the letter to the changing conditions of the Empire, and guiding itself by the spirit of the Sacred Book. The great issue between the two Schools turned at one time upon the interpretation to be given to the obligation of the Holy War (Djihad) against the Unbeliever, whether the duty of waging the Djihad was confined to the defence of Islam when attacked, or was an aggressive duty against the Unbeliever under all circumstances. The strict interpretation of the Koran prevailed as long as the Mussulman was everywhere victorious through dissensions amongst the Powers of Christendom; but larger and more liberal views have obtained the ascendant since the Treaty of 1740, when Sultan Mahmoud I undertook to bind his august successors to observe faithfully his Imperial Capitulation with King Louis XV of France and his successors. This was a great innovation upon the ancient rule of interpretation, under which all Treaties with the Unbeliever were only temporary suspensions of hostility. A far more important innovation was made in 1871 in respect of the liberty which the Koran allows to the good Mussulman to release himself from all compacts with the Unbeliever with or without notice, for upon the question whether notice is required the opinion of Mussulman lawyers is still divided. But the Porte[23] has formally acceded

[23] Gatteschi, Manuale, &c., p. xxiii.

Conferences of London of 1871.

to the Annex to the first protocol of the Conferences of London of Jan.—March, 1871, under which the Porte, in concert with the other Signatory Powers of the Treaty of Paris of 1856, has solemnly declared, that "it is an essential principle of the Law of Nations, that no Power can release itself from the obligations of a Treaty or modify its stipulations without the consent of the contracting parties by means of an amicable understanding." Hence the Capitulations of the Ottoman Porte, confirmed as they have been by a long series of Treaties with the various Powers of Europe, are to be regarded as a special chapter of the Conventional Law of Europe, indispensable to Islam in order to enable her to participate in the European Concert of Public Law without doing violence to her own Religious Law. On the other hand, they afford a guaranty to the Christian States of Europe, that the Porte, having been admitted by them to the benefit of their Public Law, will not withdraw from their subjects the privilege of living under the protection of their own laws and the jurisdiction of their own magistrates, whilst they contribute to the prosperity of the Ottoman Empire by residing within a country, in which, without the Capitulations, they would, under the Lex Loci, have no title either to safety of life or to security of property. It has been well said by the Baron J. de Testa, in his Criticism of the Ottoman Memorandum of April, 1869[24], which declared the Capitulations to be the great obstacle to the civilisation of Islam, that the statesman, who would counsel the Ottoman Porte to seek the suppression of the Capitulations, would be guilty of signal perfidy to its

[24] Communicated to the Representatives of the European Powers at Constantinople on behalf of the Sublime Porte.

true interests. The Capitulations may require modifications from time to time, but to suppress them would be to provoke a new Crusade against Islam, and to invite a violent change in the Guardianship of the Dardanelles.

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ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF WAR.

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TRAVERS TWISS, D.C.L.

REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF OXFORD,
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PREFACE.

THE Author has endeavoured, in treating of the Rights and Duties of Nations in time of War, to observe, as far as the subject would permit, the same method of investigation, which he had found eminently convenient in discussing the Rights and Duties of Nations in time of Peace. He has accordingly sought to ascertain under each head the leading Principles, which lie at the foundation of the Law, by an historical analysis of the Practice which has prevailed amongst Nations at various times, as the earlier Practice will be found in most instances to disclose some general Principle, based upon an absolute view of Belligerent Right, the application of which has become modified in modern Practice, either under the civilising influence of Commerce, or in deference to some conflicting Right of Neutrals.

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If the process of this Modification be carefully traced, Commerce will be found to have exerted its civilising influence chiefly through the form of express Treaty-Engagements, concluded in time of Peace upon a deliberate view of the mutual interest of the contracting Parties; whilst the adjustment of Belligerent Right with the conflicting Right of Neutrals has been for the most part the result of a tacit agreement between the Neutral and the Belligerent, the acquiescence of the Neutral in each case being purchased by a concession from the Belligerent of no little importance to the general Peace of the World.

History, in its relation to the Rights of War, may truly be said to be Philosophy teaching by Example; and the wider and more complete the historical survey will have been, the more irresistible will be the conclusion, that the employment of Force on the part of Nations in the prosecution of Right against other Nations has become subject to Rules, which are in accordance with Reason, and have the Common Weal for their object.

The end of War, regarded as a High Trial of Right between Nations, is either to redress past injury, or to prevent future injury, and the mode, whereby Belligerent Force operates to accomplish one or other of these objects, is by taking security (*pignoratio*) from the wrong-doer; in other words, by the seizure of his property. Hence War implies necessarily a direct operation of Force against Property, whilst it entails only accidentally the employment of Force against the Persons of individuals, by reason of the resistance which they may offer to the process of taking security from the wrong-doer. A Declaration of War implies indeed, that a Nation intends to overcome by Force any resistance, which may be offered to it in exacting satisfaction; but whilst the seizure of the Property of the Enemy is a necessary means for procuring satisfaction, which no Belligerent can be expected to renounce, the measures to be adopted for overcoming resistance are susceptible of infinite modifications; and it is in respect of such modifications that the Civilisation of the nineteenth century is far in advance of that of the seventeenth and

eighteenth centuries, and may be expected in its turn to be left behind by the Civilisation of future ages.

With regard to the Rights, which a state of War gives rise to between the Subjects of two Belligerent Powers, the greater mildness of modern manners, coupled with the instinct of Human Nature, which leads us to pity in others what we fear for ourselves, has insensibly operated to restrain the extreme exercise of those Rights, and wherever the employment of Belligerent Force in an extreme manner has fallen into desuetude, the revival of its exercise would justly be regarded as an innovation upon the modern Practice, and, as such, a breach of the Customary Law of Nations.

On the other hand, if we regard the Duties, which a state of War gives rise to between a Belligerent Power and the Subjects of a Neutral Power, a tacit agreement would seem to have been entered into between Neutral and Belligerent Powers, that on the one hand the

Neutral State shall not be implicated in the misconduct of the individual, and on the other hand the offender shall be subject to the exercise of Belligerent Right. Forfeiture of Property is under such circumstances the penalty which the Belligerent State inflicts upon the Subjects of a Neutral Power for every departure from Neutrality, whilst the Neutral State abstains from all interference between the captors and the captured, on the understanding that it shall not be responsible for the misconduct of its Subjects, nor be involved by their acts in War against its will. It is the duty of every Neutral Power, as such, to observe Impartiality, and consequently, if its Subjects voluntarily array themselves under the banner of one of the Belligerent parties, to make no complaint, if they are treated by the other as Enemies. But it will always be a question of a most delicate nature with regard to its own citizens for a Neutral State to renounce the obligation of protecting them from the operation of Belligerent Force, unless it shall be satisfied of the justice and legality of the rules of conduct, which the Belligerent

Power prescribes to its Commissioned Agents. Hence, whilst the Neutral Nation allows to a Belligerent Nation the unobstructed exercise of the Rights of War, her own dignity and security require that a Court of the Law of Nations should sit in judgment on each case, and pronounce whether her Subjects have been guilty of a breach of Neutrality, or the Commissioned Agent of the Belligerent Power has exceeded his authority. It was in this direction, that the first step was made to vindicate the equality and independence of Neutral Powers by Treaty-Stipulations, that all questions of Prize of War in regard to Neutral property should be submitted by the Belligerent captor to a judicial enquiry, so that the Neutral Subject might be heard in his defence, and not be deprived of his property, until his complicity with the Enemy should have been established. No wrong will have been inflicted upon the Subject of a Neutral Power, if he should be punished by the strong arm of a Belligerent Power for a breach of Neutrality, as soon as his bad Faith has been established; but an intolerable wrong may be inflicted upon a

Neutral merchant by a Belligerent captor, if his property should have been seized and detained in bad faith, under the pretext of the Right of every Belligerent to submit the conduct of the Subjects of a Neutral Power to the ordeal of a judicial enquiry. The prompt action of Prize Tribunals is intended to mitigate this evil, and it is therefore incumbent on the good Faith of every Belligerent Power to prevent any unreasonable delay in the action of those Tribunals.

A great concession has been made to the convenience of Neutral Commerce by the Declaration issued by the Powers assembled in Congress at Paris in 1856, under which they have renounced in regard to one another the exercise of Belligerent Right against Enemy's goods laden in vessels under the mercantile flag of a Neutral State. The Neutral Merchant has ever been a great instrument under Providence in mitigating the extreme exercise of Belligerent Right, and the victories of Commerce may be traced through a long series of Treaties and Declarations, which serve to mark

the epochs, when the more rigorous usages of War have been formally renounced by the leading Maritime Powers, after whose example such usages have subsequently been allowed by all civilised Nations to fall into desuetude.

The Right of a Belligerent to debar his Enemy from all supplies by blockading his coasts, is a right in the exercise of which all Nations, which profess Neutrality, must be prepared to acquiesce; but the interests of Neutral Commerce under the more enlightened views of the present age as to the reciprocal benefits which result from Commerce, may demand a more candid consideration at the hands of Belligerent Powers, than they have heretofore received.

That a Belligerent Power should cut off the supplies, which a Neutral merchant is carrying from a Neutral port to the Enemy's country, is eminently reasonable; but that a Belligerent Power should cut off the supplies, which a Neutral merchant is carrying from the Enemy's

ports to a Neutral country, may not accord so entirely with Reason, nor will it always rest upon the same foundations of Necessity. Great Britain and France established a blockade on 1 June 1854, against the vessels of all Nations entering the river Danube, whilst Neutral vessels were allowed to come out with cargoes destined to Neutral ports. Accordingly Greek and Ionian vessels continued to load cargoes in the Danubian ports, and the Neutral Nations of Europe were not debarred during the continuance of hostilities from all access to one of their accustomed granaries. It may well merit the calm consideration of Statesmen, whether the conduct of the Allied Powers on this occasion, in the exercise of the Right of Blockade, has not furnished an example of moderation, which will be deserving of imitation under circumstances of an analogous nature, where Neutral Nations depend upon access to the country of a Belligerent for their normal supplies of an article of primary necessity.

Another question suggests itself in reference

to the exercise of the Right of Blockade arising out of the Declaration of the Congress of Paris, that "Blockades in order to be binding ought to be effective;" in other words, "ought to be maintained by a force sufficient to prevent really all access to the coast of the Enemy." No explanation is afforded in the Protocols of the Congress on the subject of the forms, which are to attest the reality of an effective Blockade.

On the one hand, it seems reasonable to suppose, that the Congress had in view some other criterion of the reality of an effective Blockade than the actual capture of an offending vessel; on the other hand, where the presence of a blockading squadron off the mouth of a port is notorious, a Neutral merchant can hardly claim in good Faith, that his vessel should receive an actual warning from one of the Belligerent cruisers, in order that the reality should be established of all access to the Enemy's coast being interdicted. It may however deserve consideration, whether the good Faith of every Belligerent Power, which is a

party to the Declaration of Paris, should not prompt it to grant a period of Grace, after a Blockade has been *de facto* established, during which the effectiveness of the Blockade shall be attested to Neutral merchants by an actual warning given by the blockading squadron to all vessels seeking access to a blockaded port, and during which period no Neutral vessel shall be confiscated, unless she attempts to run past the blockading squadron after such warning.

With regard to Contraband of War, no merchant can with reason complain of being treated by a Belligerent Power as an adherent of the Enemy, if he carries to the Enemy supplies of war; but there are many articles of Equivocal Use, and there will be from time to time articles of Novel Character, respecting which it will not be always clear to the merchant, that it is inconsistent with Neutrality to transport them to the Enemy's country. Naval steam-engines, for instance, are articles of modern invention, and were for some time considered to be only serviceable for vessels

of Commerce, whereas they are now likely to supersede all other motive power for ships of War. It may be a question in the present day, whether it would not be in accordance with that large Equity, which the great and rapid development of International Commerce demands at the hands of Belligerents, in order that good Faith on all sides should be maintained, that every Belligerent Power should at the outset of War notify to all Neutral Powers what articles of Equivocal Use and Novel Character it intends to capture and confiscate, if they should be intercepted by its cruisers in the course of transport to the Enemy's country. That Belligerent Powers are entitled to notify such articles to Neutral Powers, and to confiscate them after such Notification, seems not to have been doubted in the seventeenth century. Sir Leoline Jenkins, after stating his opinion to King Charles II, that nothing ought to be adjudged Contraband by the Law of Nations but what is subservient to the uses of War, goes on to say, "except in the case of Besieged Places, or of a General Notification made by Spain to all the world,

that they will condemn all the pitch and tar which they meet with." (29 Aug. 1674.) But whilst a Belligerent Power, to whose detriment a prohibited trade is carried on, may with Reason seize and confiscate articles of a certain character, although they may belong to the Subjects of a Neutral Power, if they are in the course of transport to the Enemy's country, the Law of Nations does not impose upon a Neutral Power, as such, any obligation to prevent its Subjects from embarking their property in trade with either of two Belligerent Powers.

The transport of merchandise to the ports of a Belligerent State is *per se* a perfectly lawful act on the part of a Neutral merchant; and it is only by reason of the accidental uses, to which certain articles of merchandise may be applied in consequence of War existing between two States, that the Right to intercept such merchandise in the course of transport on the High Seas to the ports of a Belligerent Power, and to confiscate it to its own uses, accrues to the adverse Belligerent. The right of the Neutral to transport and of the adverse Belligerent to seize,

are conflicting Rights, and neither party can charge the other with a criminal act. Upon this view of the Common Law, which is sanctioned by the highest Authorities, it would be under an erroneous conception of the juridical relations which exist between Belligerent States and Neutral States, that a Belligerent Power, in the absence of special Treaty-Engagements with a Neutral Power, should hold itself entitled to complain to the latter of its not exercising its authority to restrain the trade of its Subjects with the adverse Belligerent. The Belligerent, to use the language of an eminent Judge of the Supreme Court of the United States, must content himself with cutting up the Neutral Commerce, and ought to make no complaint to the Neutral Power, not even where the individual merchant rescues his vessel after capture, and escapes into his own or a friendly port.

The historical survey, which the Author has endeavoured to complete, as occasion has permitted, in the course of the following pages, establishes the material fact, that the main

Principles of Prize Law were considered nearly in the same light four hundred years ago as in the present day; and that the Rules, in which those Principles were then embodied, were framed with particular attention, and with special regard to the Practice and Usage which had anciently prevailed in such matters. We have thus the experience of ages attesting the existence of a Law, to which Belligerent Nations pay respect even in the moment of victory, and the beneficial operation of which Law has been promoted by equitable concessions, which Belligerents have wisely made from time to time, in the administration of it. The Rights of War can never be absolutely renounced by Nations, for they are Natural Rights, to which every Nation may be compelled, under circumstances of an extreme kind, to have recourse; but the exercise of those Rights can at all times be moderated, and it is by moderation in the exercise of them, that those Nations which claim to be the leaders of the civilised World in the arts of Peace, are bound to set an example to other Nations in time of War.

The Allied Powers in 1854 were not unmindful of their responsibility on this head; and the Emperor of All the Russias showed himself to be equally alive to his duty, as one of the Great Powers of Europe.

The Author would have gladly welcomed tidings of similar import, if they had been wafted across the waters of the Atlantic from a land with which Great Britain has so many ties of brotherhood and sympathy, and upon which the desolating scourge of Civil War has descended with an intensity of fury, to which Christian Europe has perhaps exhibited no parallel, unless it may be discovered in the Annals of the Thirty Years' War. That a contest of so anomalous a character, as that which is raging between the States of the North American Continent, would give rise to some intricate questions of public Law between the United States of America and the Maritime Powers of Europe, was to be expected. The institution of a Blockade of the whole Seaboard of the Confederate States, although the scale of such a Blockade may not be without pre-

cedent, has been attended with consequences of a more serious character to Neutral States, by the stoppage of the domestic industry of their artisans, than have heretofore ever resulted from such an exercise of Belligerent Right; whilst the possible application of the rule of Enemy-Character attaching to Neutral vessels, by reason of their carrying Enemy's despatches, although such despatches are being conveyed to a Neutral port in Public Letter-bags under the seal of a Neutral Post Office, has given rise to questions, which are not readily solved by reference to any previous Practice amongst Nations, and may require to be adjusted by Negotiation, or perhaps by express Convention.

Whilst the present volume has been passing through the Press, the Second Annotated Edition of Wheaton's Elements of International Law has appeared from the pen of Mr. William Beach Lawrence, enriched with copious notes by its learned Editor, bearing upon topics growing out of the pending hostilities on the American Continent. Mr. Lawrence has dis-

cussed several of the leading questions, which have arisen between the United States and Great Britain, with the moderation and impartiality which was to be expected from a Publicist, who unites the practical experience of a Diplomatist with an enlarged theoretical knowledge of his subject. His contributions on those topics will be found to be a valuable addition to the work of Mr. Wheaton, which he has otherwise edited with great care.

Another Treatise on International Law has appeared from the pen of an American Citizen, who at the time of its publication at San Francisco, in the month of May 1861, described himself as lately serving on the Staff of the Commander of the Pacific Squadron during the War between the United States and Mexico, and as Secretary of State for California. The writer, General H. W. Halleck, has since been called upon to fill the office of Secretary of War to the President of the United States, and is now known to Europe in that capacity. His Treatise is an useful and practical work, satisfying the object for which it professes to

have been composed; and it will be found more particularly valuable to the European Student from the varied information which it contains in relation to Political transactions, which have taken place between the United States of America and the Central American and South American States.

Whilst the North American Continent has thus been fertile in writers on Public Law, it is a matter of congratulation to find that there is much harmony between their views and those of European Publicists.

Sir Robert Phillimore's Commentaries on International Law, and M. Heffter's Treatise on the Public International Law of Europe, which has been translated from German into French by Dr. Jules Bergson, are recent European works of a practical character, and to which the Student may refer with much interest and profit, if he seeks to know what the Rights of War are, and not what the Rights of War might be, if the interests of Neutral Nations were exclusively consulted.

The Treatise on Maritime Prize, from the pens of M. de Pistoye and M. Duverdy; and M. Theodore Ortolan's Diplomatie de la Mer, are also valuable for the same object.

There are also other modern French Publicists of eminence, amongst whom M. de Hautefeuille occupies a leading position, whose works are of great interest and of great merit with reference to their special object, but whose guidance would not be equally safe, either to the Statesman or to the Student of Public Law, in the sense in which that Law is administered in Practice, and to which Practice Nations must conform themselves at the risk of incurring its penalties.

With regard to the contents of the following pages, the Author has not attempted to exhaust the subject of the Rights and Duties of Nations in time of War. His endeavour has been to select the most important, and what he ventures to consider to be the cardinal, topics of those branches of the Law of Nations, which have reference to the Rights and Duties of

Belligerents towards each other, and to the Rights and Duties of Neutrals towards Belligerents; and in avoiding all speculative discussions he has indulged a hope, that if the work should be found for that reason wanting in interest to the general reader, it will be the more worthy of favour from its usefulness to those, who are engaged in the practical duties of Diplomacy, and in other active departments of Public life.

OXFORD,
JUNE 18, 1863.

PART II.

OF THE

RIGHTS AND DUTIES OF NATIONS IN TIME OF WAR.

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THE LAW OF NATIONS.

CHAPTER I.

SETTLEMENT OF INTERNATIONAL DISPUTES.

Nature of International Differences—Duty of Self-preservation—Right of International Action—Amicable Conference—Compromise—Arbitration—Mediation—Congresses of Christian Powers—Duty of Moderation—Retorsion—Embargoes—Practice of Marque and Reprisals—Letters of Contremarque—Growth of the Admiralty Jurisdiction—Armemens en Course—Grant of Reprisals—Reprisals consistent with Peace—Negative and Positive Reprisals—Special and General Reprisals—The Grand Pensionary De Witt—Conditional Declaration of War—Chief Justice Hale—Reprisals against Spain in 1739—Reprisals against the Two Sicilies in 1839—General Reprisals not always lawful—Sir Leoline Jenkins—Grotius—Bynkershoek—Vattel—Reprisals against Persons—Political Envoys exempt from Reprisals—Case of the Duc de Belleisle—Case of the Envoys of the Confederate States of America in the British packet Trent—Regulation of the Practice of Marque and Reprisals by Treaties—Renunciation of the Practice of Marque by the Congress of Paris in 1856.

Differences between Nations.

§ 1. NATIONS being independent political bodies, holding intercourse with one another upon a footing of equality and reciprocity, are liable, in satisfying the duties of Natural Society, to have differences

with one another upon questions of mutual Right. These differences may arise, either by reason of a Nation refusing to perform a good office to another Nation, to the performance of which the latter considers itself to have a claim of Right; or by reason of a Nation suffering an ill office from another Nation, from which the former considers itself entitled of Right to be exempt. "The differences," says Vattel[1], "which arise between Nations or their rulers are on account either of contested rights or of injuries received. A Nation ought to maintain the rights which belong to it; on the other hand the care of its own safety and glory forbids it to submit to injury. But in fulfilling the duty which a Nation owes to itself, it must not forget its duties to other Nations." It is in the practical adjustment of these two principles, according to the circumstances of each individual case, that we discover the rule for appeasing the disputes which may arise between Nations upon questions of Right. A Nation cannot claim anything as of Right due to itself which would be injurious to another Nation; neither can it claim in redress for an injury, which it has undergone, anything which would be inconsistent with the Right of another Nation. Equality and reciprocity are fundamental conditions in measuring the remedies for international Wrong, equally as they are fundamental conditions in determining the Right, the violation of which constitutes international Wrong.

§ 2. The perfection of every political community consists in its aptitude to fulfil the ends of civil society; and one of the chief ends of civil society is to secure, by the cooperation of all the members of a political community, a greater degree of well-being to each individual than he could obtain by his own

[1] Droit des Gens, L. II. c. 17. § 323.

unaided exertions. Accordingly, in the act of political association, by virtue of which a multitude of men constitute themselves into a State or Nation, each individual enters into an engagement with the body to promote the general welfare; and the State or Nation in return enters into an engagement with each member to facilitate for him the means of supplying his necessities, and to protect and defend him. It is manifest therefore that the maintenance of the political association itself is an essential condition for the fulfilment of these reciprocal engagements, and the State or Nation is thus under a primary obligation to preserve itself; in other words, Self-preservation is a primary duty of National Life. This duty of Self-preservation on the part of a Nation implies, as a corollary, the duty of preserving each of its members. It owes this duty in the first place to itself, since the loss of one of its members impairs the integrity of the body, and at the same time weakens it. It owes this duty also to each of its members in particular, for the individuals, who compose a Nation, have united themselves together for their mutual defence and common advantage; and none of them can justly be deprived of this Union, and of the advantages which he expects to derive from it, whilst he fulfils on his side the conditions of it. The body of a Nation cannot abandon a province, or a town, or even a single individual member, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons founded on considerations of the public safety[2].

Duty of Self-preservation.

§ 3. The obligation of a Nation to preserve itself and to preserve all its members, is not limited to those matters only which affect its internal constitution, but extends to its external relations with other

[2] Vattel, Droit des Gens, L. I. c. 2. § 17.

Nations; in other words, to those matters which regard the intercourse of itself as a political community, or of its members individually, with any other Nation as such, or with the several members thereof. The right of Self-preservation accordingly gives to a Nation a moral power of acting in regard to other Nations in such a manner, as may be requisite to prevent them from obstructing its preservation or its perfection[3]. This Right is a perfect Right, since it is given to satisfy a natural and indispensable duty; and our Right may frequently fail to be respected, and its effects will be uncertain, unless we may use compulsion towards those who refuse to fulfil the corresponding obligation. A Nation has accordingly a right to resist any attempt on the part of another Nation to injure it, and in case that it has suffered an injury from another Nation, to exact complete reparation for it. At the same time it is bound to abstain from doing any injury to another Nation, and to give adequate satisfaction for any injury which it may have inflicted upon it. An individual citizen is at liberty to waive his right and to forgive an injury, without incurring any increased risk to his life or property, for he lives under the protection of the Civil Magistrate, and may invoke his aid against any ungrateful and malicious fellow-citizen, who may have been encouraged by his indulgence to renew the offence. But a Nation cannot appeal to any superior Power on earth, in case it should have forgiven an injury, which has been inflicted upon it by another Nation, and thereby have encouraged it to offend again. A more powerful Nation may indeed overlook an injury which it has received from a less powerful Nation, without any derogation to its future safety; but between Powers which are nearly

3 Vattel, L. II. c. 4. § 49.

equal, the submission on the part of one of such Powers to an injury, without insisting upon complete satisfaction from the other Power, is almost always attributed to cowardice or weakness, and seldom fails to subject the injured party to further wrong of a more atrocious character. A Nation is accordingly bound, in the presence of another Nation, to maintain its Right, and to seek satisfaction for wrong, under the penalty of forfeiting its character of an independent political body; for to acquiesce tamely in an injury which has been inflicted upon any of its members by another Nation, would be equivalent to the admission of its inability to secure to its members the enjoyment of their Right, without the consent of the other Nation; in other words, it would be a virtual acquiescence on its part in a state of dependence upon the other Nation. A Nation has therefore a moral Right of Action against other Nations, which withhold from it its Right, or has inflicted injury upon it. But this Right of Action against another Nation is capable of being exercised either by an appeal to reason, or by a recourse to arms. But a recourse to arms, although it may ultimately assert and enforce substantial justice to be done by the Nation, which has been a wrong-doer, brings with it, as an indirect but necessary consequence, such a train of evils and calamities resulting to innocent individuals, that an appeal to reason should always be made in the first instance, unless there is evident peril to the safety of a Nation, if it does not have immediate recourse to arms.

Right of International Action.

§ 4. An appeal to Reason may be made in various ways. *Amicable Conference* is the first and most obvious mode; and it commends itself to Nations by two weighty considerations. Men will often concede to Reason what they feel bound to deny to Force; for, to

Amicable Conference.

give way to argument savours of generosity, or at least does not necessarily imply any inferiority; whilst men for the sake of preventing war will allow of several things, to which they could not be compelled by force of arms. The object of *Amicable Conference* is to examine candidly the subject in dispute, with a view to do justice, so that the party, whose Right is found to be the more doubtful of the two, may voluntarily renounce it. To renounce a right after discussion does not necessarily imply a want of power to enforce it, which might encourage an enemy to make further encroachment; but, on the contrary, is consistent with a wish to do justice. There are even occasions, when it may be advisable for the Nation, which is found to have the clearer Right, to renounce it for the sake of preserving Peace and gaining a friend; for to renounce a right in this manner is not to abandon or neglect it, and in yielding up amicably what you are entitled to maintain by force, you conciliate an opponent. Amicable Conference will generally lead to an equitable adjustment of the conflicting pretensions of Nations; and where the subject in dispute is difficult to adjust by the standard of strict Right, it tends to facilitate a *Compromise*, which is for the most part a preferable alternative to war. As examples of *Compromise*, we may refer to the settlement of the boundary between the territory of the United States and the British possessions in North America. In the case of the North-east Boundary[4] it had been found impracticable to ascertain a line which would answer the conditions of the previous treaty-engagements between the two Powers: in the case of the North-west Boundary[5]

Compromise.

4 Treaty of Washington, 9 August, 1842. Martens, Nouveau Recueil Général, III. p. 456.

5 Treaty of Washington, 15 January, 1846. Ibid. IX. p. 27.

Great Britain thought it consistent with her dignity to recede from her strict right, and adopt a compromise from considerations of convenience.

The established practice amongst Nations, of accrediting Resident Envoys to foreign Courts, facilitates in a high degree the settlement of international disputes by amicable conference; and as long as Resident Embassies continue to be maintained as normal channels of international communication, there will be a permanent guaranty amongst nations, that some attempt will always be made to settle their disputes by reason, before they have recourse to arms. This guaranty will be increased in strength, in proportion as Diplomacy acquires the character of a Science, and the Diplomatic Envoy comes to be selected from those persons, who have made the Rights of Nations their peculiar study. The Roman people seem at a very early period of their history to have appreciated the importance of submitting their disputes with other Nations to a council of judges, well versed in the science of international Right, before they had recourse to arms; and it was the province of the College of Fecials not merely to advise the State in negotiating peace and alliance, but to furnish, when required, ambassadors qualified to demand redress for injuries received from other Nations, and to declare war against them, if adequate redress should not be granted[6]. Resident Embassies.

§ 5. *Arbitration* is another method of bringing international disputes to a peaceable termination, where direct conferences between the Representatives of the Nations, which are at issue upon a question of Right, have failed to bring about an amicable settlement. When Nations have agreed to refer any Arbitration.

[6] Cicero de Officiis, L. I. c. 13. Cicero de Rep. L. II. c. 17. Livii Hist. L. I. c. 32.

question in dispute between them to Arbitration, their good faith is pledged to abide by the decision of the Arbitrator, unless the decision should involve a clear departure from the terms of the reference, or should be in absolute conflict with the rules of justice, and therefore incapable of being the subject of a valid international compact, or should be the manifest result of fraud and collusion with one of the parties. A departure from the terms of the reference was alleged on the occasion, when the United States of America and Great Britain agreed by the Convention of London (29 Sept. 1827[7]) to refer the points of difference which had arisen in the settlement of the boundary between the British and American dominions, as described in the fifth Article of the Treaty of Ghent, to some friendly Sovereign or State, who should be invited to investigate and make a decision upon such points of difference; and they further agreed that the decision of the arbiter, when given, should be taken as final and conclusive, and should be carried without reserve into immediate effect by Commissioners appointed for that purpose by the contracting parties. Notwithstanding the absolute terms in which the parties to this Convention bound themselves to acquiesce in the decision of the Sovereign arbiter, the Senate of the United States considered that the opinion of the King of the Netherlands on the case referred to him, which he delivered in writing to the Plenipotentiaries of the United States and of Great Britain on 10 Jan. 1831, was not obligatory on the United States[8], on the ground that the award did not follow the submission, but merely

Treaty of Ghent.

7 Martens, N. R. VII. p. 491. British and Foreign State Papers 1826, 7. p. 1005.

8 Message of President Jackson, 6 Dec. 1831. British and Foreign State Papers 1830, 31. p. 957. Message of 4 Dec. 1832. ib. 1831, 32. p. 244.

recommended a conventional line, which it designated[9]; and accordingly, upon the advice of the Senate, the President of the United States opened a further negotiation with the British Crown. Cases of fraud and collusion on the part of an international arbiter are rare. Puffendorf[10] alludes to an instance in which the Emperor Maximilian and the Doge of Venice submitted their differences to the arbitration of Pope Leo X, while each of them privately tampered with the Roman Pontiff to declare on his side.

Cases in which the decision of the arbitrating Power is in direct conflict with the rules of justice are equally rare. They occur for the most part where the arbiter has some advantage in view, which may accrue to himself from an unjust decision, and where he is sufficiently powerful not to fear the resentment of the parties, who have deferred the settlement of their conflicting claims to his decision. Of this character was that decision of the Roman people, which Livy narrates with very strong reprobation, when the cities of Ardea and of Aricium having deferred their dispute in regard to the sovereignty over a certain country to the arbitration of the Roman people, the Assembly of the Roman Tribes adjudged the territory in controversy to be the property of the Roman State[11]. Grotius[12] has very justly observed, that although in a doubtful case of title both Nations are bound to seek for conditions of compromise rather than to have recourse to war, yet this obligation presses more strongly on the Nation which makes a claim, than on the Nation which is in

Ardea and Aricium.

9 American Annual Register, 1830, 31. p. 146.

10 Puffendorf, Law of Nature and of Nations, L. V. c. 13. § 4. Guicciardini Istoria, Tom. VI. p. 141.

11 Livii Historia, L. III. c. 71.

12 Grotius, L. II. c. 23. § 11. Wolff, Jus Gentium, § 576.

possession of a thing; for it is agreeable not only to civil but to natural law, that the possessor of a thing in all cases of equal claim should be in a more favourable position than the party who seeks to disturb him: *Melior est conditio possidentis.* A claimant accordingly, who may be satisfied of the goodness of his cause, but cannot prove that a party in possession is wrongfully in possession of a thing, cannot lawfully make war, because he has not the right to compel the other to give up possession. It is not necessary that Nations, in referring any matter in dispute between them to the arbitration of a third party, should select an independent State or a Sovereign Prince as arbiter. It was by no means unfrequent in the middle ages for Nations to refer the decision of matters, which might be in controversy between them, to the arbitration of the Faculty of Law in some famous University. Thus we find the Doctors of the great Law School of Bologna continually called upon to furnish arbiters in the disputes between the Italian Republics. On the other hand, the most powerful States in modern times have not hesitated to refer to Commercial Tribunals the decision of questions, which may have arisen between themselves and a less powerful State, and in which the commercial interests of their subjects have been concerned. Thus Great Britain has on two very recent occasions agreed with Portugal to refer to the Senate of the city of Hamburg the decision of claims made by British Merchants against the Portuguese Government, and the Senate of Hamburg has undertaken on both occasions the arbitration; and it has decided the dispute on the first occasion in favor of the Portuguese Government[13], and on the second occasion in favor of the British Merchant[14].

Law School of Bologna.

Senate of Hamburg.

[13] Croft's Case, 1858. [14] Shortridge's Case, 1861.

§ 6. *Arbitration*, writes Vattel[15], is a very reasonable mode, and one that is perfectly conformable to the law of Nature, for the decision of every dispute which does not directly interest the safety of a Nation. Accordingly we find it sometimes a matter of stipulation in treaties of alliance between independent States, that their disputes shall be submitted to arbiters, in case they cannot adjust them by amicable conference. Such a provision is more particularly a feature of Federal Pacts, under which neighbouring States associate themselves together for the permanent purpose of mutual defence, and are recognized internationally in the character of a Confederated Body of States. Thus it was provided by Article XI of the Act which constituted the Germanic Confederation, that the Confederated States should not make war upon one another under any pretext whatsoever, nor should prosecute their differences by force of arms, but should refer them to the Diet. The Diet on the other hand has undertaken to mediate between the States which may have differences with one another; and if its mediation should fail, then to refer their dispute to an *Austegral* tribunal (Austrägal-instanz), to the judgment of which the litigant parties shall submit without appeal. After a similar design was the project of the Abbé St. Pierre for securing a perpetual peace amongst the European Powers, which was circulated in Europe shortly after the conferences which led to the peace of Utrecht, and at which conferences the Abbé was present. By a kind of pious fraud, with a view to recommend it more strongly to the adoption of Sovereign Princes and their ministers, he attributed the project to King Henry IV. of France

Germanic Confederation.

Abbé St. Pierre.

[15] L. II. c. 18. § 329.

and his minister Sully[16]. He subsequently developed his plan more fully in 1729, and based it upon the state of possession amongst the European Powers as settled by the treaties of Utrecht, seeking to make that state of things perpetual by preserving the equilibrium of forces between those Powers, and by adjusting all controversies between them by pacific means. With this object in view he proposed that the members of the Christian commonwealth of Nations should renounce the right of making war upon one another, and accept the mediation of an European Diet for the settlement of their mutual differences, three fourths of the votes being necessary for a definitive judgment[17]. This scheme in its speculative details has many striking features of resemblance to the machinery of the existing Germanic Diet.

Mediation.

§ 7. *Mediation*, whereby a third Power interposes its good offices to bring about the peaceable settlement of a matter which is in dispute between two Powers, differs from *Arbitration* in this respect, that the decision of an arbiter is obligatory, whilst a mediator merely gives counsel and advice. It is perfectly lawful for an independent Power to offer to mediate between other independent Powers which are either preparing for or actually engaged in war, and to suggest to them a compromise, if a claim of right has

[16] Projet de Traité pour rendre la Paix perpetuelle entre les Souverains Chrétiens, pour maintenir toujours le commerce entre les Nations, et pour affermir beaucoup davantage les maisons souveraines sur le trône, proposé autrefois par Henri le Grand Roi de France, agréé par la Reine Elizabeth, par Jaques I. et par la plupart des autres potentats de l'Europe. Utrecht, 1713.

[17] Wheaton's History of the Law of Nations, p. 262. It is not improbable that the project of the Abbé St. Pierre may have suggested to Prince Metternich some of the details of his plan for organising the Diet of the Germanic Confederation.

been set up by either of them ; or in case the dispute should relate to an injury which has been inflicted upon either of them, to advise that a reasonable satisfaction for the injury should be offered and accepted. It is obviously the duty of an individual, when he is not under any obligation to take part in a dispute between his friends, to endeavour to bring about an amicable settlement between them ; whilst it is frequently the interest of a Nation to prevent war breaking out between other Nations, for some of the sparks of the fire which is kindled in its neighbourhood may possibly reach it ; whilst, on the other hand, it may be dangerous to a Nation to have both or either of its neighbours ruined. A care for its own safety will therefore justify a Nation in interposing its good offices between disputing Nations. The interposition of a Nation to prevent a war between two other Nations is an act of a totally different character from the intervention of a Nation in the domestic affairs of another Nation ; and whilst the latter is objectionable on principle, as an encroachment on the just rights of an independent political community, the former is not only in strict law an international proceeding, but may be the imperative duty of a Nation, whenever the occurrence of war would oblige it to take part with one or other of the belligerents. Puffendorf[18] holds that two or more neutral Nations, if they have a common interest that a war should be terminated, may lawfully agree upon what terms peace ought to be concluded between the belligerent parties, and may thereupon prescribe such terms of agreement to the belligerents, with a manifesto that they will join their forces against the party which refuses those terms ; and that this sort of mediation

[18] Law of Nature and Nations, L. V. c. 13. § 7.

is the more commendable, if it puts an end to a war which would prove destructive to one or both of the parties. Upon some such principle, Russia, France, and Great Britain, interposed as mediators between the Ottoman Porte and the Hellenic people, and secured on the part of the Porte the recognition of an independent kingdom of Greece, under their joint guaranty. Bynkershoek[19] holds that it is not allowable for a Nation to interpose between other Nations and to compel them to make peace; but the practice of Nations is opposed to his views, and one of the instances which he cites seems to suggest a principle which rather sanctions the right of interposition, than militates against the existence of this right. Thus France, England, and Holland, united to compel Sweden to make peace with Denmark on 21 May 1659, at a moment when Sweden was on the point of entirely subjugating Denmark. The extinction of the international life of a State, in the continued existence of which, as a member of the family of Nations, all other Nations have an interest, is an event respecting which all Nations may claim to have a voice, and, if they please, to take up arms to prevent it. War between Nations, in the sense in which it imposes the duties of Neutrality upon other Nations, is a contest for the attainment of Right, and not a struggle to accomplish the ruin of either party. Grotius[20] maintains that war may be justly undertaken by any Nation against a Nation which prosecutes its revenge with malice, and exceeds the just measure of punishment in avenging a wrong which it may have suffered from another Nation. Thus a powerful Nation, under the pretext of injury received

Kingdom of Greece.

Sweden and Denmark.

19 Quæst. Jur. Publ. c. 25. § 10.

20 De Jure Belli, L. II. c. 20. § 40.

from a weaker Nation, might declare war against it, and proceed to subjugate it, when the latter was prepared to make adequate redress. Under such circumstances any Nation would be justified in mediating to prevent war; and as a recourse to arms on the part of the more powerful Nation would be without lawful excuse after an offer of complete redress had been made by the offending Nation, any mediating Power would be justified in such a case in interposing to compel the more powerful State to remain at peace. A war waged under such circumstances would be an unjust war on the part of the more powerful Nation; and it is at all times the duty of Nations to interpose and arrest the perpetration of injustice, seeing that in an unjust war every Nation may rightfully side with the party which is wrongfully attacked.

§ 8. It is not always easy for a third Power, which offers to mediate between two contending Powers, to satisfy them both of the integrity of its intentions in offering its mediation, and if it should advise either to remit something of its pretensions, to preserve a character for impartiality. Hence it becomes advisable, when war threatens to break out between any two Nations, in the necessary absence of any constituted tribunal before which the plaint of a Nation can be brought for adjudication, that two or more Nations should offer their joint mediation to maintain peace. Grotius[21] holds that it would be not only useful, but that it is in some respects necessary, that Congresses of the Christian powers should be held from time to time, in which the controversies, that may have arisen amongst any of them, may be settled by others whose interests are not affected by them, and in which

Congresses of Christian Powers.

[21] De Jure Belli, L. II. c. 23. § 8. 4.

measures may be taken to compel disputing parties to accept peace on equitable terms. The practice of the Sovereign Powers of Europe since the peace of Westphalia has been to cooperate in a policy of Mediation, wherever there has been probable danger of the Balance of Power, as established by the Treaties of Osnabrück and Munster, being effectively disturbed. A system of European Concert has thus been maintained, with slight intermissions, since that time, by Conferences or Congresses of the European Powers. A Congress[22] is an assembly of Plenipotentiaries, appointed to find out means of conciliation, and to discuss and adjust the respective pretensions of the contending parties, who should always be invited to take part in the deliberations of the Congress. One of the most recent instances of this form of joint Mediation is furnished by the Conferences of Vienna, commenced on 15 March 1855, and in which Austria, France, and Great Britain endeavoured to mediate between Russia and the Ottoman Porte, with a view to prevent a war between those Powers, and to bring about an amicable settlement of their differences in the general interest of Europe. The Plenipotentiaries of the two contending Powers took part in the Conferences; and when the efforts of the Congress had failed to secure peace, the mediating Powers[23] sided with that Power, which in their opinion had been wrongfully attacked.

Conferences of Vienna.

§ 9. It is the duty of a Nation, when it advances a claim of right, to show a good foundation for demanding a thing which it does not possess. Possession in the case of Nations gives rise to the Right of not being disturbed, unless the origin of the possession can be shown to have been wrongful. Hence

22 Vattel, L. II. c. 18. § 330.
23 Martens, N. R. Gén. XV. p. 633.

it is not justifiable for a Nation to disturb by force of arms another Nation which is in possession of a territory, if the claimant has only an uncertain or a doubtful title, but a claimant in such a case has a right to compel a possessor, even by force of arms, if necessary, to come to an amicable discussion of the question of right, or to submit it to arbitration, with a view to settle the point in dispute by articles of agreement. If, on the other hand, a dispute should arise between two Nations on account of an injury received[24] by one of them, the injured party ought to follow a similar rule of proceeding, unless it is convinced that its adversary would not entertain with sincerity its proposal for an amicable reparation, or that the delay, which the discussion of the wrong would give rise to, would only expose it to greater danger of being worsted in an appeal to arms. This moderation is the more becoming, and as Vattel says, is in general cases even indispensable, since the act which a Nation may be disposed to regard as an injury, does not always proceed from a design[25] to offend it, and may be rather a mistake than an act of malice. Besides it frequently happens that the injury has been done by individuals without any sanction from the Nation of which they are members, and if satisfaction should be demanded from it, the Nation will not refuse to do justice. Instances are frequent in which Sovereign Princes have refused to countenance the wrongful acts of their subjects towards the subjects of other Sovereign Princes, and have thought it not a derogation from their independence, upon complaint made to them, to give satisfaction for the wrong. It is perfectly consistent with good faith for a Nation, which has received an injury, to make preparations for war,

Duty of moderation.

[24] Vattel, L. II. c. 18. § 331. 333. 337.
[25] Ibid, L. II. c. 18. § 338.

while it attempts by pacific negotiation to obtain reparation for the injury. For war must be presumed to be the necessary alternative, if amicable negotiation should fail, and the right of self-preservation warrants a Nation in taking measures to guard itself against hostile surprise.

§ 10. When a Nation cannot obtain redress in an amicable manner from another Nation, either for the refusal of a right, or the infliction of a wrong, it may proceed to do justice to itself in the former case by Retorsion, in the latter case by Reprisals. When a Sovereign Prince is not satisfied with the manner in which his subjects are treated according to the laws and customs of another Nation, he is at liberty to declare, that he will treat the members of that Nation in the same manner as his own subjects are treated. This is what is called by Vattel[26] Retorsion of Right. "There is nothing in this," he observes, "but what is conformable to justice and sound policy. No one can complain on receiving the same treatment which he has exhibited to others." Klüber[27] has instituted a distinction between Retorsion of Fact (retorsio facti) and Retorsion of Right (retorsio juris), and limits the application of the latter term to questions of Comity, as distinguished from questions of Right. But the distinction appears to have no practical value, and tends to cause confusion rather than greater clearness. It may be true that for offences against Comity, a Nation has no other remedy than to reciprocate the uncourteous conduct of the offending Nation, for a violation of Comity is clearly not the subject of a just war[28], as every Nation must be the final judge for itself of the nature and extent of the Comity or

Retorsion of Right.

Retorsion of Fact.

[26] Rétorsion de Droit, L. II. c. 18. § 341. Retorsio Juris, Wolfii, Jus Gentium, § 582.

[27] Klüber, § 234.

[28] Grotius, L. II. c. 22. § 16.

courtesy which it will show to other Nations. But there are many rights, for the refusal of which the proper remedy, as between Nations, is passive Retaliation, or in other words Retorsion. Thus if a Sovereign Prince should forbid to the subjects of another Sovereign Prince access to the ports of his territory for the purposes of peaceful commerce, the latter Prince may with justice retort the prohibition upon the subjects of the former in regard to his own ports. But the prohibition of all commerce would not be a suspension[29] of Comity, but a denial of a Natural Right, for the total hinderance of commerce would be contrary to the nature of human society, being the debarring of mankind, as St. Ambrose says, from sharing the goods of their common mother, which are scattered about for the benefit of all. Yet a Nation in such a case would not be justified in having recourse to war. In like manner, if a Nation chooses to grant to the subjects of another Nation special privileges within its territory, although it may be contrary to natural equity to exclude the subjects of other Nations from the enjoyment of similar advantages, yet such exclusion does not constitute a wrong which may be redressed by arms, but only justifies Retorsion or passive Retaliation. Active Retaliation, or the *Lex Talionis* in its full sense, has no place between Nations, for a Nation has no right to extend a penalty beyond what its own safety requires; and Retaliation which is unjust between individuals, would be much more unjust between Nations, because it would be difficult in the latter case to make the punishment fall upon the actual wrong-doers[30]. On the other hand, Sovereign Princes are held to participate so far in the wrongful acts of

Lex Talionis.

[29] Grotius, L. II. c. 2. § 18. L. II. c. 18. § 339. Klüber, § 234.

[30] Vattel, L. I. c. 13. § 171;

their subjects, and subjects are held to be so far amenable for the faults of their rulers, amongst which faults the foremost is their neglect to compel their subjects to do justice to the subjects of other Sovereign Princes, that they may reasonably be required mutually to share the inconveniences, which will result from a reciprocal rule of conduct being adopted by other Nations.

§ 11. If a Nation has refused to pay a debt to, or has inflicted an injury upon the subjects of another Nation, and the former has refused to make satisfaction or to give redress, the latter may proceed to do justice to its subjects by making Reprisals upon the former. Every political community takes upon itself the responsibility of the acts of its members in relation to other political communities, if, upon complaint made to it, it does not constrain the wrong-doers to make satisfaction. A Nation, as such, only takes cognisance of individual men as members of a Nation, and who, as such, belong either to its own political body, or to some other independent political body. If an individual is a wrong-doer, and is a member of its own body, the Governing Power of a Nation proceeds to exact satisfaction from him according to its own laws; but those laws being only operative within its own territory, a Nation cannot exact satisfaction in like manner from a member of another independent political body, who does not happen to be within its territory. It must in such a case demand at the hands of the Governing Power of the Nation, to which the offending party belongs, satisfaction for the offence; and if the Nation refuses to constrain its own subject to make such satisfaction, it takes upon itself the responsibility of his acts, and makes itself an accessory to the wrong which he has committed. An injured Nation is

Reprisals.

under such circumstances justified in seizing both the persons and the property of the subjects of the other Nation, with a view to keep them as pledges until it has obtained satisfaction; or even, in the case of property, to apply it at once in satisfaction of the debt, or in compensation for the injury[30].

Embargo.

§ 12. *Embargo* is one of the modes of proceeding which a Nation may adopt with a view to obtain satisfaction for a debt or an injury. The term is borrowed from the Spanish Law-procedure, and signifies *arrest* or *sequestration;* and it is applied to the seizure or detention of persons or property, which happen to be within the territory of a Nation at the time of seizure. Embargo is a term of very varied import. It is frequently used to denote the seizure of ships and cargoes in the ports of a Nation under the authority of its municipal law; and such seizures and the consequent detention are spoken of as Civil Embargoes. An International Embargo, on the other hand, is an act not of civil procedure, but of hostile detention. It may be made for the same object as Reprisals are made upon the high seas, namely, for the satisfaction of a debt, or for the redress of an injury; but it may also be made in cases where Reprisals could not justly be granted, and frequently by way of prelude to war. It is, however, not in itself an act of war, but is at first equivocal as to its effect; and if the matter in dispute ends in reconciliation, the seizure, although hostile in form, proves in substance to have been merely a temporary sequestration consistent with relations of amity. On the other hand, if the transaction ends in war, the subsequent hostilities impress a retrospective character on the Embargo, and it is to be considered a

Equivocal in character.

30 Grotius, L. III. c. 2. § 14. Puffendorf, L. I. c. 13. § 10. Vattel, L. II. § 342.

hostile sequestration *ab initio*. The property seized in such a case is liable to be regarded as the property of persons who were trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. Such is the necessary course, to use the language of Lord Stowell[31], if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. It may be open to question, however, whether the doctrine of *provisional Embargoes* has not been maintained by the British Prize Courts in too absolute a manner. An Embargo *by way of obtaining redress* may be justifiable, notwithstanding that the parties, whose persons and property are seized and detained, have ventured within the jurisdiction of the Nation which makes the Embargo, trusting to that security which the existing relations of peace between the two Nations warrant. If they should suffer in the result, they will suffer vicariously for the wrong which their Nation has refused to redress, and they will have no just cause of complaint except against the original wrong-doer, or their own Nation, which has failed to compel him to do justice. But an Embargo, which is made merely *in contemplation of war* under circumstances in which Reprisals could not be justly granted, cannot well be distinguished from a breach of good faith towards the parties who are the subject of it. It seems not unreasonable therefore to limit the international right of Embargo to those cases in which it is clear that the Nation which makes the Embargo is entitled to exact satisfaction for a debt, or compensation for an injury; and in which cases the right may be lawfully exercised during that ambiguous state of things, which precedes open war. The President of the

Provisional Embargoes.

[31] The Boedes Lust, 5 Robinson, p. 246.

United States (Jefferson) thus speaks of the Embargo laid upon American vessels in British ports in 1807-8[32]: "The immediate danger we are in of a rupture with England is postponed for this year. This is effected by the Embargo, as the question was simply between this and war. That *may* go on a certain time, perhaps through the year, without the loss of their property to our citizens; but only its remaining unemployed in their hands. A time would come, however, when war would be preferable to the continuance of the Embargo."

Reprisals.

§ 13. *Reprisals* is a term derived from the old French word *Reprisalles*, which is found in documents of the fourteenth century, as for instance, under the antique form of *Reprisalx*, in an English Statute, 17 Edw. III. st. 2. c. 17. (anno 1355), and likewise in a treaty between England and France, of 7th of May, 1360[33]. The Latin forms *Repræsalia* or *Repressaliæ*, the latter of which is adopted by Bynkershoek, do not appear to have been familiar to Grotius, as he uses the word *pignoratio*, which is borrowed from the Civil Law of Rome; but the word *Repreysalliæ* occurs in an ancient Aragonese Charter[34], of a date as early as anno 1326, so that we may be satisfied that the International remedy for Wrong, which the word Reprisals denoted, was in general practice in Europe during the early part of the fourteenth century. The practice of Reprisals seems to have been the complete form of the exercise of the Right of Redress, which had been termed as early as the twelfth century the practice of Marque. The word Marque, which is of French origin, has been identified by some authors with the German

Practice of Marque.

[32] Letter to Charles Pinckney, March 30, 1808. Jefferson's Correspondence, Vol. IV. p. 114.

[33] Dumont, Traités, Tom. II. Pt. I. p. 16.

[34] Ducange, Vox *Marcha*. (4.)

"Mark," or the Latin Marcha, in the sense of a boundary; and Letters of Marque have been accordingly interpreted to mean Letters of Licence granted by a Sovereign Prince to his subjects to cross the frontier of his territory with the object of attacking a neighbouring Prince or his subjects. By other authors the phrase Letters of Marque has been held to mean Licences from an Independent Prince to set a mark upon, or to seize as a pledge, the goods of others. There is no doubt that the verb *Marcare*, or *Marchiare*, is used in documents of the thirteenth century in a sense akin to that of the pure Latin word *pignorare*. A Charter granted anno 1283, by Peter (III.) the Great, of Aragon, to the citizens of Barcelona, forbids any provisions imported into the city of Barcelona by sea or land from being arrested or taken in pledge. Victualia quæ apportantur in Barcinona per mare vel per terram . . . non *marcentur* neque pignorentur . . . tam pro alienis debitis quam pro propriis[35]. So, likewise, the Council of Marciac[36], in France, in the next century (anno 1326), enacted that, Personæ Ecclesiasticæ vel earum bona pro aliis non *marchientur* vel pignorentur. (Cap. LIV.)

The analogy of the Roman Civil Law, which authorised a creditor in certain cases to proceed summarily against his debtor per pignoris capionem[37], in other words, to seize any property belonging to his debtor as a pledge for the payment of his debt, suggests rather that the original meaning of the word *marcare*, in connection with the *jus marcandi*, Droit de Marque, was that of arresting and sequestrating goods or property, and in this sense we find Letters of *Contremarque* issued by Sovereign Princes to their subjects, authorising them

Letters of Contre-marque.

35 Ducange, Glossarium, Vox *Marcare*.

36 Labbei Concilia, Tom. XI. Par. II. p. 1767.

37 Gaii Institut. L. IV. c. 26.

in their turn to seize the goods of those who had taken from them their goods under the authority of Letters of Marque.

§ 14. The granting of Letters of Marque by Sovereign Princes to the commanders of private ships, armed and equipped for maritime warfare at the expense of their owners, although it may now be regarded as an institution of a barbarous age, which ought to be allowed to fall into desuetude, was nevertheless the first systematic attempt to regulate private warfare on the high seas, and thereby paved the way for its abolition. During that long period of anarchy, which prevailed on the high seas after the breaking up of the Roman Empire, merchants had been compelled to form themselves into voluntary associations for mutual defence against lawless sea-rovers, and thus it happened, that the police of the high seas came to be administered by voluntary associations. These bodies were accustomed to exact redress without waiting for any authority of Princes, not merely in behalf of the members of such associations, but also in behalf of other honest merchants, who had been despoiled of their goods by pirates, or had otherwise suffered violence on the high seas in the pursuit of their lawful calling. Besides these associations for mutual defence, other associations were organised in the great commercial cities of the Mediterranean, for the express purpose of making war against pirates, and articles of association came to be framed with a view to regulate the conduct of their expeditions, and the distribution of the booty captured from the enemy. There is extant a very ancient body of Ordinances of the fourteenth century for the government of the armed vessels of these voluntary associations going on a cruise, which are bound up with the Consolato del Mare in some ancient editions, as if they

Growth of the Admiralty Jurisdiction.

formed a portion of that work[38], but they deserve to be regarded as altogether distinct in their origin. They have most probably been confused with the Consolato del Mare owing to the circumstance that they are found in a very ancient manuscript joined on to the latter work, as if they were a continuance of it. M. Pardessus[39] has very properly separated these ordinances from the chapters of the Consolato, and has published them apart, under the title of "Chapitres sur les Armemens en Course," as being in substance a portion of the Maritime Law of Catalonia and Aragon. From these ordinances it would appear that these private Societies of cruisers, or to call them by their Italian name *corsari*, were allowed to appropriate to themselves the property which they had captured at sea, without the authority of a Commission from any Sovereign Prince, and without any necessity of bringing in their prizes for adjudication before disposing of them. It would not be unreasonable to suppose that this general licence of cruising against pirates, styled *la guerra del corso*, would degenerate in course of time into something very much akin to the evil practices which it was intended to suppress, and that it would become necessary for Sovereign Princes to regulate in its turn the practice of cruising (la course). We accordingly find Ordinances issued by Sovereign Princes, upon consultation with the Councils of Commerce (les prud-hommes de mer), for regulating the practice of cruising, and after the Admiralty Jurisdiction came to be exercised by Sovereign Princes, measures were taken by them to put an end to the system of private warfare on the high seas, by stipulating with one another that their subjects

Armemens en Course.

[38] In some editions of the Consolato they form the 298th and following chapters.

[39] Lois Maritimes, V. p. 396.

should not be allowed to make war without an authority to that effect from their respective Sovereigns. It would seem that, in the thirteenth century[40], Sovereign Princes had begun to forbid their subjects to cruise against the subjects of other Princes without their authority; but it was not before the fourteenth century that any mention of Letters of Marque occurs in Public Treaties, or that it came to be thought obligatory upon private cruisers to provide themselves with an authority from a Sovereign Prince, in the form of Letters of Marque, or Letters of Reprisals.

§ 15. When an injury has been committed by the subjects of an Independent Prince upon the subjects of another Independent Prince, and the former has plainly refused, or unreasonably delayed, to procure redress to be made by the offending parties, the latter, in virtue of his obligation to protect his subjects, is warranted in authorising them to make Reprisals[41] upon the offending parties and their fellow-subjects, for their fellow-subjects accept the responsibility of the acts of the offending parties by supporting the Sovereign Power of their State in its refusal or delay to procure redress. It is not an unreasonable view of the origin of this practice of Reprisals, which refers it to the inability of Independent Princes, in the infancy of international life, to induce their more powerful subjects to make redress for wrong done by them to the subjects of

Grant of Reprisals.

[40] Thus king Edward I. of England says, in a letter of the year 1295, "Bernardus nobis supplicavit ut nos sibi licentiam *marcandi* homines et subditos de regno Portugalliæ et bona eorum per terram et mare, ubicunque eos et bona eorum invenire possit, concederemus, quousque de sibi ablatis integram habuisset restitutionem." Rymer. Fœdera, T. II. p. 69.

[41] The Law and Custom of Nations in respect of Reprisals is very lucidly set forth in a Report (Oct. 11, 1650) made by the Judge of the High Court of Admiralty of England to the Council of State. Thurlow's State Papers, Vol. I. p. 264.

other Independent Princes; as in such cases Princes would be likely to prefer that the injured parties should exact redress for themselves, rather than they should have to turn their arms against their own subjects to compel them to make such redress.

The employment of force by an Independent Prince, for the purpose of making Reprisals against the subjects of another Independent Prince, has accordingly been held to be compatible with the maintenance of general pacific relations between the two Nations. Bynkershoek observes that Reprisals[42] have only place in time of peace. Reprisals are for the most part resorted to for the purpose of redressing a wrong inflicted upon an individual, after he has ineffectually demanded justice from the Sovereign Power of the Nation, of which the wrong-doer is a member. Under such circumstances, everything that belongs to the Nation is subject to Reprisals, wherever it can be taken, provided that it is not a deposit entrusted to the public faith[43]; for as a Nation has control over the latter only in consequence of that implicit confidence, which the owner of the deposit has placed in its good faith, it ought to respect it as sacred even in the case of open war. But as between Nations, the property of individuals is regarded as belonging to the Nation at large of which they are members. Accordingly the private property of every individual member of a Nation is liable to Reprisals in redress for wrong inflicted upon a member of another Nation. Further, it is only from the Sovereign Power of a Nation, that authority is rightfully derived to make Reprisals upon the private property of the members of another Nation. Vattel holds that when Reprisals have been made, it is the duty of the Sovereign to

Reprisals consistent with Peace.

[42] Repressaliis locum non esse nisi in pace. Bynkershoek, Quæst. Juris Publici, c. 24.

[43] Vattel, L. II. c. 18. § 344.

compel those of his subjects who by their conduct have given occasion for just Reprisals, to compensate those upon whom the Reprisals have fallen, and so to take care that the property of innocent persons be not made answerable for the obligations of others. For although the Sovereign, by refusing or delaying to do justice, may have brought on Reprisals against his own subjects, those who were the final cause of them do not become less guilty, and the fault of their Sovereign does not exempt them from repairing the consequences of their own offence.

§ 16. Jurists, who confine the use of the term *Retorsion* to remedies for departures from Comity, have divided Reprisals into *negative* and *positive* Reprisals, according as they are instituted by reason of the refusal of a Right or the infliction of an Injury. According to this nomenclature which Klüber appears to have introduced, and which is adopted by Mr. Wheaton[44] and Dr. Phillimore, negative Reprisals take place when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another Nation to enjoy a right which it claims. Positive Reprisals, on the other hand, take place when a State seizes persons and effects belonging to another Nation, in order to obtain satisfaction for a wrong or an injury. Heffter, on the other hand, following Grotius, De Wolff, and Vattel, limits the term Reprisals to acts of force, to which a Nation has recourse in order to obtain satisfaction for wrong or injury done to itself or its subjects, and according to this view, those acts which are termed *Negative* Reprisals are more properly classed under the head of Retorsion. If we look to the etymology of the words Retorsion and Reprisals, Heffter appears to have reason on his side. The sense, which ancient usage has attached to the term Letters of Reprisals,

Negative and positive Reprisals.

44 Wheaton, Elements, P. IV. c. 1. § 2. Phillimore, Vol. III. § 12.

coincides with the etymology of the word, besides whenever Reprisals are spoken of in Treaties, there is no doubt that acts of forcible possession are in the contemplation of the framers of those Treaties.

Special Reprisals.

§ 17. A more substantial and less technical division of Reprisals is that which is founded upon the extent to which a Sovereign Power permits them to proceed. Reprisals are *Special*, when a Sovereign Prince grants Letters of Reprisals and Marque to certain of his Subjects, who have suffered wrong from the Subjects of another Sovereign Prince, for which they have in vain demanded justice. Such Reprisals are held in practice to be perfectly consistent with a state of amity between Nations, and they are identical with the Reprisals of the fourteenth century, by which private war was reduced to a certain order, and the way was paved for its extinction by subjecting it to the control of Sovereign Princes.

General Reprisals.

General Reprisals, on the other hand, is a general permission given by a Sovereign Power to its Subjects to seize the persons and property of the Subjects of another Power. It is immaterial in what manner such Reprisals are executed, whether by the commissioned ships of the Crown, or by the armed ships of its Subjects at large under Letters of Marque and Reprisals from the Crown, so long as General Reprisals are ordered by the Sovereign Power to be made against the persons and property of the Subjects of another Power. Several writers, following the supposed authority of the Grand Pensionary De Witt, approve his remark, as if it was of general application, that "he saw no difference between General Reprisals and Open War[45]." There is however an im-

De Witt.

45 This remark of the Grand Pensionary is cited in a note to a passage in Vattel, L. II. c. 18. § 346. Several writers have referred to it, as if it were a statement of the customary law of

portant difference between them, and it would appear that those writers who have supposed themselves to be countenanced by the Grand Pensionary of the States General, have not sufficiently kept in view the occasion of his remark. It appears that England had laid an Embargo in 1662 upon all Dutch vessels in British ports in favour of the Knights of Malta, in reprisal for the detention by the Dutch of certain property belonging to the Knights, and that the States General[46] remonstrated against Reprisals being made by a Sovereign Prince in behalf of foreigners, not his subjects, as being contrary to the practice of Nations. England on this occasion acquiesced in the justice of the Dutch remonstrance, and directed the Embargo to be raised. On this occasion the Grand Pensionary remarked that he saw no difference between General Reprisals and Open War; and it may well be, that such a general sequestration of Dutch vessels in British ports, if not warranted by the Law of Nations, could only be regarded as an act of Open War against the States General. But an order for General Reprisals seems to be distinguishable in the practice of Nations from a declaration of war in this respect, that a State of Peace is not terminated by an order for General Reprisals in the same manner as it is terminated by a declaration of war. There is still a *locus pœnitentiæ* open to a Nation against which General Reprisals have been declared, and have even begun to be enforced; and until it resents an act of General Reprisals, there is no war. If a Nation declares war against another Nation, it renounces all

Europe, which Vattel himself had adopted in the very words of the Grand Pensionary. But the note is not found in the original edition of Vattel's work: it is added for the first time in the edition of 1797, which was published after Vattel's death.

[46] Bynkershoek, De Foro Legatorum, c. 22.

its treaties of friendship and alliance with it, and there is an end to all international amity towards its subjects. Thus it was contemplated by President Jefferson[47] in 1808, that recourse should be had by the United States of America to General Reprisals against the Continental System of the Emperor Napoleon, on the assumption that a repeal of the edicts issued by the Emperor and by the President of the United States respectively would at once revive relations of peace without the delay and ceremonies of a treaty. Jefferson, it is true, speaks of the relations which would exist between France and the United States under a system of General Reprisals as relations between belligerents; but so in a certain sense are Special Reprisals, being acts of forcible possession for the attainment of right, which are not altogether consistent in theory with perfect peace between Nations, yet in practice they are held to be exceptional measures consistent with amity, and which do not give rise to a State of War[48]. The more correct view seems to be, that General Reprisals *per se* are not inconsistent with a State of Peace, although they may be in certain cases a preliminary step towards a public war. According to present usage, they are in the nature of a conditional declaration of war, which, however, may still be averted by an offer of satisfaction from the offending State. Chief Justice Hale, in his Pleas of the Crown (Vol. I. p. 162, 3),

Conditional declaration of war.

[47] Perhaps the advocates of the second (war) may to a formal declaration of war prefer general letters of Mark and Reprisal, because on repeal of their edicts by the belligerents, a revocation of the letters of Mark restores peace without the delay, difficulties, and ceremonies of a treaty. Letters of Jefferson to Lt. Governor Lincoln, Washington, Nov. 13, 1808. Jefferson's Correspondence, 8vo. Lond. 1829, Vol. IV. p. 119.

[48] Letters of Marque and Reprisal are mentioned in the 9th of the Articles of Confederation of the United States (anno 1781) as issuing in time of peace.

says, that "General Marque or Reprisal doth not make the two Nations in a perfect state of hostility between them, though they mutually take from one another, as enemies, and many times, in process of time, these General Reprisals grow into a very formal war: and this was the condition of the war between us and the Dutch 22 Feb. anno 1664, the first beginning whereof was by that Act of Council, which instituted only a kind of universal Reprisal, and there were particular reasons of State for it, but in process of time it grew into a very war, and that without any war solemnly denounced." Thus General Letters of Marque and Reprisal were issued by England against Spain on 10 July, 1739, by reason of Spain exercising a right of search over English vessels beyond the limits of her jurisdictional waters on the coast of South America. The Ambassadors of both Powers, notwithstanding this, remained at their respective posts. Spain in return issued Letters of Reprisal on 20th July, 1739, and it was not until two months had expired after the English Letters of Reprisal had been issued, that the Ambassadors of the two Nations left the Courts to which they had been respectively accredited. War was formally declared by England on 19th October, 1739.

Reprisals against Spain in 1739.

§ 18. That General Reprisals are distinct in character from War, and are not attended with that interruption of all friendly relations which War entails, may be inferred from the proceedings which took place in 1839-40, between her Britannic Majesty's Government and the Government of the King of the Two Sicilies, in reference to the Sulphur Monopoly in Sicily, which had been granted by the Crown of Naples to a Company of French Merchants, (Messrs. Taix, Aycard, and C^ie.) The British Government held that the grant made to the French Company

Reprisals against the Two Sicilies in 1839.

was a breach of the Treaty of Commerce of 1816 between Great Britain and the Two Sicilies. On this occasion, after the British Minister at Naples had formally demanded the revocation of the grant made to the French Company, and the Neapolitan Government had declined to comply with this demand, orders from the British Government were transmitted to the Admiral of the British fleet in the Mediterranean Sea " to cause all Neapolitan and Sicilian ships which he might meet with either in the Neapolitan or Sicilian waters to be seized and detained, until such time as notice should be received from her Majesty's Minister at Naples that the just demand of her Britannic Majesty's Government had been complied with." Lord Palmerston, then Secretary of State for Foreign Affairs, upon the announcement that the British Admiral was proceeding to carry out his instructions, sent a despatch[49] to the British Minister at Naples (April 14, 1840), in which he observes, that " as the Reprisals, which Sir Robert Stopford has been instructed to make, *do not,* however, *constitute war,* it is not the wish of Her Majesty's Government that you should follow up those steps by quitting Naples. If indeed the Neapolitan Government were to add to the injustice, which it has committed towards British subjects in regard to the Sulphur Monopoly, by any acts of violence towards British subjects or property, you would in such case leave Naples, and retire to Rome, there to await further instructions." On 17th April the British fleet began to make Reprisals in the vicinity of Naples, and captured a number of Neapolitan vessels. An Embargo was at the same time laid in the ports of Malta on all vessels that bore the

[49] British and Foreign State Papers, 1840, 41, p. 202.

Sicilian flag[50]. Naples, on the other hand, made preparations for defence; and the Neapolitan Government laid an Embargo[51] on all British vessels in Neapolitan and Sicilian ports. Everything appeared to be tending to open war, when the Cabinet of the Tuileries offered its mediation, and the King of the Two Sicilies accepted it (26 April, 1840). Reprisals thereupon ceased to be made on either side; the Neapolitan Government agreed to dissolve its contract with the French Company, and the vessels seized by the British fleet by way of Reprisals were restored to their Neapolitan owners without the general relations of peace between the two Nations having suffered any such interruption, which required that they should be renewed by any formal Treaty of Peace between the two Nations.

Reprisals not always lawful.

§ 19. Although General Reprisals do not necessarily put an end to all relations of amity, and so far are means for procuring international redress short of actual war, there are cases in which it would not be lawful to use Reprisals by way of prelude to war, and in which a proclamation of General Reprisals would be equivalent to a proclamation of War. To such cases the observation of the Grand Pensionary De Witt[52] is justly applicable, when he remarked, that he saw no distinction between the General Reprisals made by the British Government and open War. Acts of Reprisal as distinguished from acts of War are only allowed by the Law of Nations, when there has been a denial of justice to a well-founded claim, or such a delay as is inconsistent with an honest intention to do justice. "Reprisals," says

[50] Annual Register, 1840, p. 210.

[51] Annuaire Historique Universel, 1840, p. 48.

[52] Letter to the King in Council, Oct. 8, 1675.

Sir Leoline Jenkins. Sir Leoline Jenkins[53], "will not lie where there is neither denial of justice, nor a delay amounting to denial." Grotius. "Reprisals," writes Grotius, "are a species of violent execution, which takes place when Right is denied[54]." Bynkershoek. "Reprisals," says Bynkershoek[55], "are not to be granted except upon an open denial of justice." Vattel. "It is only for an evidently just cause," writes Vattel[56], "and for a clear and undeniable debt, that the Law of Nations allows us to make Reprisals; for he who advances a doubtful claim cannot in the first instance demand anything more than a fair examination of his right. In the next place, before he proceed to such extremities, he should be able to show that he has ineffectually demanded justice, or at least that he has every reason to think that it would be in vain for him to demand it. Then alone does it become lawful for him to take the matter into his own hands, and to do himself justice."

International justice may be denied in several ways, either by the refusal of a Nation to entertain the complaint at all or to allow the right to be established before its ordinary tribunals, or by studied delays and impediments, for which no good reason can be given, and which in effect are equivalent to a refusal, or by an evidently unjust and partial decision[57]. But if a court of competent jurisdiction should pass an erroneous judgment in a doubtful question in which a foreigner is a party, such a result would give no right of Reprisals to

53 Sir Leoline Jenkins's Works, Vol. II. p. 778.

54 Locum autem habet, ut aiunt juris consulti, ubi jus denegatur. Grotius de Jure B. et P., L. III. c. 2. § 14.

55 Quæstiones Juris Publici, L. I. c. 24.

56 Law of Nations, L. II. c. 18. § 343.

57 Vattel, L. II. c. 18. § 350.

the Nation to which the foreigner belongs, if the judges have been left free, and have given sentence according to their conscience. Upon doubtful questions, different men think and judge differently; and all that a foreigner can desire is, that justice should be as impartially administered to him as it is to the subjects of the Prince, in whose courts the matter is tried." Grotius observes, that "in a doubtful case the presumption is always in favour of the established judges, and that Reprisals are permitted by custom only, where judgment is given plainly against Right[58]."

Reprisals against persons.

§ 20. Reprisals by the custom of Nations extend to persons as well as to property. Reprisals against persons known by the Greek name *ἀνδρολημψία*, or the seizure of persons, are recognised by Grotius, Vattel, Bynkershoek, and all modern writers; but under the practice of the Christian Nations of Europe this form of Reprisals is seldom resorted to, except with a view to obtain satisfaction for the unjust seizure or detention of other persons. Thus in 1740[59] the Empress Catherine of Russia having arrested the Baron de Stackelberg, who was a natural born subject of Russia but had acquired a Prussian domicile and was in the military service of Prussia, the King of Prussia made reprisal by seizing two Russian subjects, and detained them until the Baron de Stackelberg was liberated. Whenever persons are thus seized by way of reprisal, they are entitled to be treated as hostages, whose lives are sacred, and who are entitled to good treatment[60]. A Sovereign has no right to put to death the subjects of a State

[58] De Jure Belli, L. III. c. 2. § 5.

[59] Moser, Versuch, VIII. 504.

[60] Vattel, L. II. c. 18. § 351.

which has done him an injury, except when they are engaged in actual war against him. By the Law of Nations all the subjects of an offending Power, whether they are natural born subjects or persons who have acquired a *domicile* in his territory by long residence therein, are liable in their persons and their property to the operation of Reprisals made against that Power; but individuals who may be only temporarily resident in the country, or travelling through it, do not thereby incur any liability to Reprisals[61]; for the liability to undergo Reprisals is as it were a liability to share the burden of a public debt, to which those are not liable who are only subject to the laws of a country for a time.

Political Envoys exempt from Reprisals.

Political Envoys, although they may be permanently resident in a country, are equally exempt from the operation of Reprisals. They cannot be the subjects of Reprisals, either in their persons or in their property, on the part of the Nation which has received them in the character of envoys (legati), for they have entrusted themselves and their property in good faith to its protection; on the other hand, they cannot be the subjects of Reprisals on the part of another Nation, which may be entitled to make Reprisals on the Sovereign to whom they are accredited, as they are not *domiciled* within his territory. Grotius appears to consider that Political Envoys who are on their way to our enemies, and come *within our territory* without having first obtained letters of safe conduct, may be seized by way of reprisal[62]. The meaning of Grotius is not altogether clear, and several writers have objected to such

Grotius.

[61] Grotius, de Jure Belli, L. III. c. 2. § 7.

[62] A numero tamen subditorum jure gentium excipiuntur legati non ad hostes nostros missi, et res eorum. De Jure Belli, L. III. c. 2. § 7.

an interpretation of the passage, but as Grotius elsewhere[63] says that if political Envoys (legati) presume to pass without a safe conduct through the territory of a Power to which they are not accredited, and are going to its enemies, or coming from its enemies, or in any other way take part with its enemies, they may be lawfully killed, there is no difficulty in supposing that he means to lay it down, that a mission to or from an enemy will expose a Political Envoy, whilst he is *in transitu* through the territory of a belligerent Power, to the operation of reprisals on the part of that Power. Thus the Duc de Belleisle, having incautiously entered the Hanoverian territory on his way to St. Petersburg, as ambassador from the King of France, who was at that time at war with Hanover and Great Britain, was arrested with his suite by the Hanoverian Government, and sent to England as a prisoner of State[64]. It is quite another thing, observes Grotius, if any Prince shall *out of his own territory* contrive to surprise the Ambassadors of another State, for this would be a direct breach of the Law of Nations[65]. The case of the seizure of the Envoys of the Confederate States of America on their way to Europe on board the British Post Office Packet, the Trent, by an United States cruiser, would seem to come within the prohibition laid down by Grotius. Their seizure was justly re-

Duc de Belleisle.

The British Packet Trent.

[63] Non pertinet ergo hæc lex ad eos per quorum fines, non accepta venia, transeunt legati; nam siquidem ad hostes eorum eunt, aut ab hostibus veniunt, aut alioqui hostilia moliuntur, interfici etiam poterunt. De Jure Belli, L. II. c. 18. § 5.

[64] Martens, Causes célèbres du Droit des Gens, Tom. I. p. 285.

[65] Aliud sit si quis extra fines suos insidias ponit legatis alienis, eo enim jus gentium violaretur. Et hoc continetur in Thessalorum oratione contra Philippum apud Livium (L. XXXIX. c. 25). Grotius de Jure Belli et Pacis in notis suis ad L. II. 118. § v. 2.

sented by Great Britain as a direct breach of the Law of Nations, and the Envoys, at the demand of the British Government, were set at liberty by the Government of the United States, and allowed to proceed to Europe in a British vessel.

Institution of Letters of Marque.

§ 21. It has been observed that the institution[66] of Letters of Marque and Reprisal was the first systematic step in controlling private warfare, and in restraining individuals from disturbing the public peace at their own discretion. The Right of Marque, as a prerogative of Sovereign Power, is mentioned in Letters Patent and Diplomas of the twelfth century[67], in which the Sovereign grants to certain of his subjects the Right of Marque against other of his subjects, in other words, grants to them permission to seize the persons and goods of others of his subjects, against whom they have made complaint. In the thirteenth century we find Sovereign Princes granting Marque to their subjects against the subjects of other Sovereign Princes. In the fourteenth century[68] Municipal Laws were passed in various countries, prohibiting individual citizens from making Reprisals without having previously obtained Letters of Marque from a Sovereign Prince. In the fifteenth century[69] Treaties of Peace occur frequently, in which there are stipulations that all ships, which should go out of port, should give security not to make Reprisals; other treaties also occur in this century, in which the Contracting Parties undertake not to grant Reprisals

66 Ducange, Glossarium, Vox *Marcha*.

67 Rymer. Fœdera, Tom. II. p. 691. Letter of king Edward I. of England.

68 27 Edw. III. St. 2. c. 17. anno 1359.

69 Treaties between France and England, anno 1440, Dumont, T. III. pars i. p. 548; between Spain and England, anno 1489, Dumont, T. II. pars ii. p. 219.

to their subjects at all, unless they should have first addressed a complaint to the Sovereign, from whose subjects they have received injury, and have been refused redress[70]. In the sixteenth century we find it stipulated in various treaties of commerce that neither party shall grant Letters of Marque or Reprisal against any others than the principal delinquents and their goods, and only for manifest delay or denial of justice[71]. In the seventeenth century treaties for the first time appear, in which it is agreed that no Reprisals shall be granted on either side, but that prompt justice shall be administered[72]. These treaties however are exceptional, as it was stipulated in most treaties of this period, that if justice were not done within a definite period, as for instance, three, four, or six months, Reprisals should be allowed. In the eighteenth century we find a great number of treaties, providing that the goods of the subjects of either party, which may lie within the territory of the other party, shall be exempt from seizure for Reprisals, except on account of the debt or crime of the owner[73]. It has been the crowning work of the Congress of Paris, in the nineteenth century, to abolish the practice of Sovereign Princes issuing Letters of Marque, as far as the Nations which are parties to the Declaration of Paris are

Regulations of Practices of Marque by Treaties.

Renunciation of Marque by Congress of Paris in 1856.

[70] Treaty between France and Spain, anno 1489, Dumont, T. IV. pars ii. p. 11.

[71] Treaty between France and England, anno 1510, Dumont, T. IV. pars i. p. 126.

[72] Treaty between England and Denmark, anno 1621, Dumont, T. V. pars ii. p. 393.

[73] Treaties between France and the United Provinces, anno 1739; France and Denmark, anno 1742; Sweden and the United States, anno 1783; Prussia and the United States, anno 1785; Austria and Russia, anno 1785; England and France, anno 1786; France and Russia, anno 1787; Russia and Portugal, anno 1787.

concerned, the first Article of which declares that "La Course est et demeure abolie[74]." The effect of this Declaration will be examined in a subsequent chapter, in which La Course, or the use of Privateers, will be more fully discussed.

74 Martens, N. R. Gén. XV. p. 768.

CHAPTER II.

WAR AND ITS CHARACTERISTICS.

War as defined by Grotius—Bynkershoek's definition—War the contention of independent political communities in the prosecution of Right—View of Grotius as to Private Warfare—Albericus Gentilis—War a necessary Alternative—Lord Bacon's view of War as the highest trial of Right—Grotius—Private Peace inconsistent with Public War—Lawful recourse to War—Offensive and Defensive War—Vattel—Grotius—Formal Declaration of War—Law of the Germanic Empire in the Twelfth Century—Law of Europe in the Fourteenth Century—Declaration of War by Heralds-at-Arms—Proclamation of War at home by Heralds—No British Declaration of War by a Herald since Queen Mary's reign—Last occasion of a Declaration of War by a Herald-at-Arms in 1657, at Copenhagen—Printed Declarations of War in the reign of Charles II—Manifestoes of War to Neutral Nations—Recall of resident Envoys—Disuse of formal Declarations of War—Last occasion of a formal Declaration of War by Great Britain in 1762—Letter of Lord Chancellor Thurlow in 1778—Object of Proclamations of War at home—Object of Manifestoes to Neutral Powers—Opinion of M. de Hautefeuille as to the necessity of a Declaration of War—A State of War *de facto*—Texas and Mexico—Burlamaqui's opinion—Practice of the United States of America—The maintenance of the Status ante bellum conditional—Unilateral Declaration of War sanctions reciprocal hostilities—Recall or Dismissal of resident Envoys—Treaties—Ignorance of hostilities on the part of Neutrals.

War as defined by Grotius.

§ 22. WAR has been defined by Grotius, at the outset of his work, to be the State or Condition of parties contending by force, as such. "Status per vim certantium quâ tales sunt." Under this large

acceptation of the term "War" Grotius comprises every species of contention by force, not even excluding single combats, which he regards as forms of private war, and which, as being more ancient than public wars, and of a common nature, he considers should be classed under the same general head[1]. In adopting this terminology, Grotius admits that the term War had, prior to his time, been used for the most part to denote public as distinguished from private contentions by force, which he accounts for on the ground that the more eminent *species* frequently usurps to itself the name of its *genus*. He assigns, at the same time, as his reason for not including *justice* in his definition of war, that the object of his enquiry was to determine whether any war can be just, and if so, what may be called a just war; and it was therefore necessary for him to distinguish the subject *War* from the question which he proposed to examine respecting it.

Bynkershoek's definition.

§ 23. Bynkershoek has objected to the definition, which Grotius has adopted, as imperfect, although he agrees with him in considering war to be the State or Condition of parties in contention, as distinguished from an act of contention, or the contest itself. He proposes what he conceives to be a more complete definition, when he says that war is a contention, by way of force or deceit, of independent parties in the prosecution of their right. "Bellum est eorum, qui suæ potestatis sunt, juris sui persequendi causa concertatio per vim vel dolum[2]." In adopting this definition, Bynkershoek admits that war may exist between individual men equally as between States, but only in the case where such individual men are *suæ potestatis*, in other words, acknowledge no political superior. He

[1] De Jure Belli et Pacis, L. I. c. 1. § 11.

[2] Observationes Juris Publici, L. I. c. 1.

rejects altogether the notion of private war, as a distinct species of war, even in theory, seeing that the word *private* implies a political body, of which the parties in contention are respectively members and are accordingly, as such, not *suæ potestatis*. War therefore, according to Bynkershoek, is properly predicated only of contentions by force or deceit between parties which acknowledge no political Superior, and which cannot therefore have recourse to a common judge, in other words, between independent political bodies; for the individual man, living in a state of solitude, is an ideal person, of whom no counterpart is found in real life. Further, Bynkershoek defines the object of all war to be the prosecution of Right, either in the way of self-defence or of self-redress, and in this respect his definition is in harmony with the more complete idea of war, of which Grotius has given an outline in his preliminary chapter, when he says that no war ought to be undertaken except for the obtaining of Right, nor, when undertaken, ought it to be carried on beyond the bounds of Right and Good Faith[3].

War the contention of Independent Political Communities.

§ 24. The more important distinction between the definitions, which Grotius and Bynkershoek have respectively adopted, consists in the limitation of the term *War*, on the part of the latter writer, to the contentions of parties who are *suæ potestatis*. War, regarded as the subject of rights and obligations, is not only such in reference to the belligerent Nations themselves, but also in reference to other Nations which take no part in the actual contention, but are said to be *neutrarum partium*. A state of War, when it exists between two Nations, gives to such Nations special rights, as Belligerents, both in regard

3 Prolegomena, § 26.

to each other, and likewise in regard to Neutral Nations, which do not exist during a state of Peace. It would seem unreasonable therefore to hold that whilst two independent political communities are at peace with one another, and with all other independent political communities, any individual members of either community can be at war with one another, and thereby give rise to special rights and obligations on the part of the communities of which they are respectively members, both in regard to each other, and in regard to other political communities, which will be foreign to the general relations of peace which exist amongst the communities themselves. War, therefore, as the subject of special rights between the belligerent parties and likewise between the belligerent parties and neutrals, must be distinguished from War in the more extensive sense in which Grotius employs the term at the outset of his work, namely, as denoting every sort of contention by force, in contrast with a judicial proceeding.

View of Grotius as to Private War.

"Undoubtedly," says Grotius, "the liberty of Private Warfare, which existed before judicial tribunals were established, has become much restricted, yet there are cases in which that liberty still exists, namely, wherever judicial tribunals are wanting; for the law, which forbids a person to obtain that which is his right in any other way than by a judicial proceeding, ought to be equitably understood, as applying only to those cases in which there is access to a judicial tribunal." Now a judicial tribunal may be wanting either for the moment or permanently. It is wanting for the moment, as happens on all those occasions, when a judge cannot be waited for without certain danger or loss; it is permanently wanting, either *de jure*, as if a person be in an unoccupied place, as for instance, on the high seas, in a desert, or on an unin-

habited island, or in any other place where there is no established civil society ; or *de facto*, as when the subject members of a civil society will not submit to the judge, or the judge openly refuses to take cognisance of the matters in dispute[3].

In all these cases Grotius holds that the liberty of Private Warfare still exists. It is not necessary to enquire whether there is, in fact, such an analogy between the cases in which individuals prosecute their Right by force in the absence of a judicial tribunal, and the cases in which a political community prosecutes its Right by force, as to warrant Grotius in classing them under the same generic head. It will be sufficient to bear in mind the more extensive sense in which Grotius uses the term War, and to remember that the ideas, which it expresses in his system, correspond to that more extensive use of the term. This circumstance will account for the conclusions of Grotius being occasionally at variance with those of other writers, who limit the term War to the contention of communities which acknowledge no political superior.

§ 25. It may well be the case that Grotius, in maintaining the liberty of Private Warfare, and in seeking to subject it to rules analogous to those which should govern Public War, was in advance of the practice of the age in which he lived, and of which he speaks in strong terms of abhorrence, as exhibiting " a license in making war, of which even barbarian nations might be ashamed, recourse being had to arms for slight reasons, or for no reasons at all ; which being once taken up, there was no longer any reverence for Right, either divine or human, just as if men had been let loose to commit all sorts of

3 De Jure Belli et Pacis, L. I. c. 3. § 11.

crime without restraint." But the Universal Society of Nations has happily made considerable progress since the age of Grotius, and in the interval much, which was repugnant to its true nature, has been slowly but steadily eliminated from its practice. If the case may still perchance occur, in which individual men have no other resource, in order to prevent injury or grievous loss being inflicted upon them by others, than to use force, such use of force is not held to give rise to a State of War either between the parties themselves, or the independent political communities of which they are members. The acts of the individuals must be authorised by the Sovereign power of the States, of which they are subjects or citizens, before they can be held to give rise to a state of War. In vain would independent political communities agree that all disputes between their respective members shall be settled by amicable discussion, if individuals were at liberty to contest with one another their mutual rights by force. War, therefore, in the sense in which its rights and obligations are the subject of Public Law, has no place between private persons. "Bellum est armorum publicorum justa contentio[4]." The employment of force in the prosecution of Right within the territory of a Nation may be a lawful act on the part of individuals, if it be sanctioned by the Law of the territory: if, on the other hand, it be not so sanctioned, it will be a trespass against the peace of the Nation to which the territory belongs, and will be punishable as such by the Sovereign Authority of the State, without any disturbance of the peace of other Nations. The employment of force, on the other hand, in the prosecution of Right, in a place which does not belong

Albericus Gentilis.

[4] Albericus Gentilis de Jure Belli, L. I. c. 11.

exclusively to any Nation, but to which all Nations have an equal right of access, will only be a lawful act on the part of individuals, if it be authorised by the common Law of Nations; for no Nation can claim of Right to enforce its territorial Law, to the exclusion of all other Law, in a place over which it has not an exclusive right of sovereignty. In a place therefore which is *publici juris*, if the employment of force by private persons be not authorised by the public Law of Nations, it will be a trespass against the general peace of Nations, and will be justiciable as such by all Nations. In order therefore that the employment of force by individuals beyond the limits of the territory of the Nation, of which they are citizens, should have any countenance of Public Law, their acts must be clothed with a certain public character, which can be imparted to them only by the authority of the State of which they are citizens. The use of force under such authority by private persons may justly be regarded as the act of the Nation itself; and the parties against whom that force is exercised will have the right of treating it as an act of War, which they may resent if they please, according to the rules which govern the disputes of Nations by arms.

War a necessary alternative.

§ 26. War then may be regarded as an alternative state of international relations, which supersedes the relations of Peace, whenever Nations prosecute their Right by force. It is impossible that differences should not arise between Nations upon questions of Right amidst the complicated relations of international society; and whenever such differences arise, the particular question of Right, which is at the foundation of them, must be decided in favour of the one or the other Nation, in order that the controversy may be appeased, and the interchange of good offices

between them, which is the true end of international society, may be resumed. In every civil society, tribunals have been set up, before which disputes between individual citizens as to their respective rights may be submitted to the arbitrament of reason; and if the party who has been adjudged before any such tribunal to have done wrong, should thereupon not redress such wrong, the united force of all the members of the civil society to which he belongs, which is termed the Sovereign Power of the civil society by reason of the authority, which directs the action of the united force of all its members, being concentrated in the person of a supreme Chief, will compel the wrong-doer to make redress. But the obligations of Natural Society which are enforced by the Sovereign Power of a State in the case of Civil Society, although they are equally binding in International Society, cannot be enforced by any analogous supreme authority. When a question of Right is in controversy between Nations, there is no supreme Chief to whose hands the direction of the united force of all Nations has been intrusted, and who would be enabled thereby to enforce the decree of any tribunal, to which the question of controverted Right might be referred. But the differences, to which the question of disputed Right will have given origin, must suspend of necessity the peaceable intercourse of Nations; for Nations, in respect of their intercourse, are Peers or Equals; and no Nation can continue to hold intercourse with another Nation under the sense of that inequality, which is implied by submitting voluntarily to Wrong. Hence it becomes a requirement of International Society, that every question of Right between Nations should be adjusted, so as not to derogate from their equality as Peers. In the absence of all other means of adjust-

ment, every Nation falls back upon the united force of all its members, and endeavours to enforce what it conceives to be Right, by the exertion of that force against the wrong-doer. War is thus undertaken by a Nation from necessity, when Right cannot be obtained by a judicial proceeding. "Ex necessitate introductum bellum, quæ est quia inter summos principes populosque liberos judicium civile et inermis disceptatio esse non potest, qui judicem scilicet non habent et superiorem, unde meritoque summi sunt, et publicorum appellationem merentur, cum minores omnes loco privatorum sunt[5]."

§ 27. Lord Bacon[6] has adopted a similar view of the nature of what is rightly termed War, when he speaks of Wars as being "the highest trials of Right, when Princes and States, that acknowledge no superior upon earth, shall put themselves upon the justice of God for the deciding of their controversies by such success, as it shall please Him to give on either side. And as in the process of particular pleas between private men all things ought to be ordered by the rules of Civil Laws, so in the proceeding of War nothing ought to be done against the Law of Nature or the Law of Honour." In other words, nothing should be attempted in war which is contrary to the practice of civilized nations, or contrary to good faith. That there is a practice of Nations in matters of war to which all Nations are expected to conform themselves[7], is an axiom of those tribunals which take

Lord Bacon's view of War.

[5] Albericus Gentilis de Jure Belli Comment. I., who says further, "Et hinc fit, ut bellum non sit, ubi ea cessat necessitas ad Martem judicem recurrendi; cessat autem semper, si principes inferiores præliantur, vel populi subditi; immo crimen læsæ majestatis patrant, si arma gesserint."

[6] Observations on a Libel, Tom. V. p. 384, Basil Montague's edit.

[7] The Hurtige Hane 3 Ch. Rob. p. 326.

Grotius.

special cognisance of the incidents of international life in time of war. "Let it be granted," says Grotius, "that Laws must be silent in the midst of arms, provided they are only those laws which are civil and judicial, and proper for times of war; but not those which are of perpetual obligation, and are equally suited to all times: for it was excellently said by Dion Prusæensis, "that between enemies written law, that is, civil laws, are not in force; but unwritten laws are in force, that is, such laws as Nature dictates, or the consent of Nations has established[8]."

Private Peace inconsistent with Public War.

§ 28. Private War being thus inconsistent with Public Peace, it follows that Private Peace is equally inconsistent with Public War. Peace may be defined to be that state or condition of things in which men adjust their differences on questions of Right by Reason. It would be an error to suppose that the absence of all differences on the subject of Right is the true test of that state or condition of international relations, which is termed Peace, as contrasted with War. Differences as to mutual Right must arise in the most elementary stages of human society; for the fundamental condition of Natural Society is, that each individual member of a community shall do for the other members everything which their welfare requires, and which he can perform, without neglecting the duty which he owes to himself. Social Right accordingly consists in the correct adjustment of the balance of duty between a man and his neighbour, in other words, between men living in society. When men unite themselves in Civil Society, the adjustment of the balance of duty between a man and his neighbour, when they differ as to their respective obligations, is ascertained by

[8] De Jure Belli et Pacis, Prolegomena, § 27.

discussion before a third party, who is authorised by the Sovereign power of the civil community to decide all differences between its members, and may invoke the aid of the whole community to carry his decision into effect. When Nations, however, unite themselves in International Society, the adjustment of the balance of duty between them respectively, when they differ, cannot be effected by discussion before a common judge; for the community of Nations has never yet consented to authorise any international tribunal to decide such differences, and to invoke the aid of the whole community to carry its decisions into effect. In the absence of any common judge or arbiter between the members of different Nations, a citizen of one Nation, who conceives himself wrongfully prejudiced by the conduct of the citizen of another Nation, has no other resource than to invoke the aid of the entire Nation, of which he is a member, to enforce an adjustment of the balance of duty between him and the wrong-doer. The only mode, whereby that adjustment can be effected against the will of the wrong-doer, is by setting in motion against the Nation itself, of which the wrong-doer is a member, the united force of all the members of the political community of which the party wronged is a member, in order to constrain the former to exert its sovereign power over the wrong-doer, and compel him to make redress. It is the exercise of the united force of all the members of an independent political community for this object, which is properly termed War in the juridical sense of the term. "Cum sint duo genera decertandi, unum per disceptationem, alterum per vim, cumque illud proprium sit hominis, hoc belluarum, confugiendum est ad posterius, si uti non licet superiori. Quare suscipienda quidem bella sunt ob eam causam, ut sine injuria in pace

vivatur[9]." It is the paramount duty of every independent political community to protect its members from suffering wrong, either at the hands of other members of the same community, or at the hands of members of other communities; and as it is a maxim of political law that no citizen can stand aloof and claim to be *neutrarum partium* in cases of civil tumult, so it is, by parity of reasoning, an axiom of international law, that no member of an independent political community can be at peace with any member of another independent political community, when the communities themselves are at war. For an individual citizen to stand aloof, when the united force of all the members of a political community is to be put forth against the members of another political community, would be to betray a primary duty of Civil Society, which is constituted after the fashion of a State, with the express design of the Sovereign Power enforcing the co-operation of all its subjects, at the proper times and places, in the business of mutual assistance and mutual defence.

Lawful recourse to War.

§ 29. An appeal to the united force of all the members of a political community to procure Right to be done to one of its members on the part of a member of another political community, in other words a recourse to War, becomes lawful only when it becomes necessary[10], and it becomes necessary only when amicable negotiation has been tried and failed, or when it is morally certain to fail, if it should be tried, or when it cannot be tried without certain danger. According to the Fetial Law of the Romans no war was just which had not been preceded either

9 Cic. Off. L. I. c. 11.

10 Justum est bellum quibus necessarium, et pia arma, quibus nulla nisi in armis relinquitur spes. Livii Hist. L. IX. c. 1.

by a formal demand of redress, or by declaration and proclamation of war. Ex quo intelligi potest, nullum bellum esse justum, nisi quod aut rebus repetitis geratur, aut denuntiatum ante sit et indictum[11]. A Nation may with good cause have recourse to war, either to procure reparation for injury done, or to obtain security against injury threatened; in other words, a Nation may lawfully make war upon another Nation which has violated, or threatened to violate its rights. But if a Nation takes up arms, when she has not received any injury, nor is menaced with any injury, she has recourse to force without lawful cause. When an injury has been inflicted upon a Nation, it is right that reparation should be made to it if the injury be of a nature to be repaired, or in case that the mischief resulting from it be irreparable, then that compensation should be made, and further that securities should be taken by the Nation that the injury should not be repeated. Again, if an injury should be threatened, it is right that a Nation should protect itself and take securities for its future safety. Hence arises a distinction between wars which are made to redress injury, and wars which are undertaken to prevent injury. When war is undertaken to enforce the reparation of an injury, and to exact satisfaction for it, it is termed an offensive war; when it is undertaken to repel actual or threatened attack, it is called a defensive war. The latter, however, is not necessarily a just war; for if a Nation, which wages an offensive war, has justice on its side, its adversary has no right to make forcible opposition; and a defensive war will be in such a case an unjust war, for it is an act of injustice to resist any person who is asserting a lawful

[11] Cic. Off. L. I. c. 11.

right[12]. But if the Nation which has been originally in the wrong offers to make restitution or reasonable satisfaction, and the other Nation is not content to accept it, the balance of right will incline in favour of the Nation which has offered satisfaction, and a defensive war on its part will be a just war.

Offensive and defensive War.

§ 30. The distinction between an offensive and a defensive war in the sense in which these terms are employed by Wolff and Vattel, is not unimportant in its bearings upon the question, whether a Nation may have recourse to arms in the prosecution of Right against another Nation without previous notice.

Vattel.

"War," says Vattel[13], "is either offensive or defensive. The Power which takes up arms to repel the attack of an enemy, carries on a defensive war; the Power which is first to take up arms and attack a Nation which is living at peace with it, wages an offensive war. The object of a defensive war is simple; it is self defence. The object of an offensive war varies with the various affairs of Nations, but in general it has regard either to the prosecution of rights, or to security. In the case of a defensive war, when a Nation takes up arms to repel attack, the reason of the thing dispenses with any previous notice.

Grotius.

"By the Law of Nature," writes Grotius, "where either force is repelled by force, or punishment is inflicted upon him who is the offender, there no denunciation is required." It is otherwise, however, in the case of an offensive war. "But as often," continues Grotius, "as one thing is to be taken for another, or the goods of a debtor to be seized for a debt, a formal demand is requisite, and still more

[12] Klüber, § 235, founds his distinction between a defensive and an offensive war on the circumstance of its justice or injustice.

[13] Droit des Gens. L. III. c. 1. § 5. Wolff. Jus Gentium, § 615.

when the goods of those who are the subjects of the debtor are to be seized; so that it may be evident that we can obtain our own, or what is due to us, in no other way[14]." For this right of so seizing is not a primary right, but a secondary and substitutive right. And in like manner before he who has the supreme Power be attacked for the debts or offences of his subjects, there ought to be interposed a formal demand which may put him in the wrong, so that he may be rightly deemed to be the cause of the damage, or to be responsible for it." In all such cases, in order to work the peculiar effects, which are legally incidental to a State of War, a declaration is required, if not on both sides, at least on one side, as a preliminary to actual hostilities[15]. The practice of Nations appears to have been in accordance with the views of Grotius as late as the middle of the seventeenth century.

Formal Declaration of War.

§ 31. The formal mode of declaring war, as established in Europe in the twelfth century, was by Letters[16] of Defiance, under the Seal of the Sovereign Power who declared war, and which were delivered by a messenger[17] into the hands of the Sovereign

[14] Naturali jure, ubi aut vis illata arcetur, aut ab eo ipso qui deliquit pœna deposcitur, nulla requiritur denuntiatio. At quoties pro re unâ res alia, aut pro debito res debitoris invaditur, multoque magis si res eorum, qui debitori subditi sunt, occupare quis velit, interpellatio requiritur, quâ constet alio modo fieri nequire, ut nostrum aut nobis debitum consequamur. De Jure B. et. P. L. III. c. 3. § vi. 1 & 2.

[15] Cæterum jure Gentium ad effectus illos peculiares omnibus casibus requiritur denuntiatio, non utrinque, sed ab alterâ partium. Ibid.

[16] Litteræ diffidationis—Lettres de deffyance.—A very early form of such a letter (anno 1427) is given in Leibnitzii Codex Jur. Gent. p. 348, in which Amadæus Duke of Savoy, announces to Philip Duke of Milan, his intention "cum amicis nostris prosilire, ut dum licet valeamus, Altissimo concedente, conspiratis injuriis obviare." The reply of the Duke of Milan is annexed.

[17] The Declaration of War on the part of Charles V of France against Edward III of England

Power against whom war was declared. The practice of declaring war by heralds and pursuivants-at-arms, which prevailed in the fifteenth and sixteenth centuries, has been considered by some writers[18] to have had its origin in the magnanimity of Knightly Honour, rather than in consideration of Order and Right, and to be one of the instances of the improvement which the Law of Nations derived from the institutions of Chivalry. It seems, however, probable, that the custom itself of formally declaring war, as a preliminary step before recourse could be had to actual hostilities, did not originate in any voluntary impulse of high chivalric feeling, but was either a tradition of the ancient Fetial Law of the Romans, which survived the fusion of Roman and Barbaric institutions, or was founded on an institution of the early Germanic tribes[19], and had acquired the character of Law throughout the Germanic Empire of the Romans in the time of the Emperor Frederic Barbarossa. (Anno 1152—1190.) The Peace of the Empire, (Land-Friede) which was established by a constitution of that Emperor, made in the Diet of Nurnberg (anno 1187), reserved to every one the right to do justice to himself, provided only that he gave three days' notice to his adversary. It was one great object of this constitution to check the practice of private warfare amongst the Princes of the Germanic Empire, and to modify its

Law of the Germanic Empire in Twelfth Century.

was delivered by a valet of the French King's household into the hands of the English King, in his Council Chamber. The latter expressed surprise at so mean a messenger being the bearer of the letter; saying that it ought to have been sent "by a prelate, or a valiant baron, or knight," and at first doubted its genuineness; but after examining the seal pronounced it to be genuine, and made preparations for war. Froissart Chronicles, I. c. 250.

[18] Ward on the Law of Nations, Vol. II. p. 207.

[19] Turpinus in Carolo Magno, c. 17. Talis erat inter eos institutio, quod, si aliquis treugam datam ante diffidentiam frangeret, statim interficeretur. Ducange, vox *Diffidare*.

evils by regulating its commencement. The same Emperor had been powerful enough to abrogate the right of private warfare altogether amongst the cities and nobles of the Kingdom of Italy at the Diet of Roncaglia (anno 1158), and he was so firmly resolved[20] to uphold the practice of giving notice to an adversary before commencing war, as essential to good faith, that he sent a messenger to Saladin the Great to demand satisfaction from him for the injuries which he had inflicted on the Christian community, and in case of refusal to declare war formally against him. We find the rule of giving three days' notice of intended hostilities maintained in a still more peremptory manner in the thirteenth century by the Golden Bull[21] of the Emperor Charles IV, (anno 1356,) which regulated the manner of commencing war amongst the German Princes, and which provided that no one should on any pretext invade his neighbour, unless he had given him three days' personal notice beforehand, or had publicly signified his intention to make war against him at the place of his usual residence in the presence of competent witnesses. From these and other instances, which occur in French and Spanish Annals[22], there can be no doubt that in the fourteenth century it was the established Law of Europe, that an offensive war could not be rightfully commenced without a previous declaration of hostilities.

Law of Europe in the Fourteenth Century.

[20] Et quia imperialis majestas neminem citra defectionem impetit, sed hostibus suis bella semper indicit, destinatus ab Imperatore ad Saladinum nuntius, ut vel Christianorum universitati, quam læsit, satisfaciat in plenum, vel diffiduciatus se præparet ad bellum. Auctor. Hist. Hierosolym, anno 1177.

[21] C. 18. De Diffidationibus.

[22] Diffidamento non præcedente legitimo et forali, regulariter nullus potest in Arragonia alium damnificare, capere, aut occidere, vel castrum ejus per vim et forciam occupare : alias incurrit pœnam traditionis. Mich. del Molino, Repertorium.

§ 32. The primary object of a formal Declaration of War was to notify to a party the intention of his adversary to prosecute his right by force[23]. But after war came to be exclusively a trial of Right between Nations, in which Sovereign Princes alone could take the initiative, and in which the whole body of their subjects was bound to array itself in arms against the adverse Nation, it became necessary for Sovereign Princes to notify by a Proclamation to their subjects the cessation of peace, and the existence of a state of war with all its legal consequences. The form and manner of declaring war abroad, as well as of proclaiming war at home, was, no doubt, influenced in some degree by the institutions of Chivalry; and the Herald of the middle ages came to discharge functions analogous to those, which were assigned to the Fetial of Ancient Rome, as the messenger of peace and war. We find accordingly that the most solemn mode of declaring war in the fifteenth and sixteenth centuries was by a herald-at-arms. Thus Garter King-of-Arms was sent by King Edward IV to Louis XI of France with a letter written in such fine language and style, that, according to Philippe de Commines, it could not have been written by an English hand[24]. The Registers of the Heralds' College in London contain numerous entries of similar missions on the part of Garter, or Clarencieux, or Norroy King-of-Arms. The functions of the Herald, however, were not confined to the business of declaring war abroad. The commencement of war was generally proclaimed

Declaration of War by Heralds-at-Arms.

Proclamation of War at home.

[23] Sed ut justum hoc significatu bellum sit, non sufficit inter summas utrinque potestates geri; sed oportet, ut audivimus, ut et publice decretum sit et quidem ita decretum publice, ut ejus rei significatio ab altera partium alteri facta sit. Grotius, L. III. c. 3. § 5.

[24] Memoires of Philippe de Commines, L. IV. c. 4.

by heralds-at-arms on behalf of the Sovereign Prince to his subjects. Thus we find it recorded by Hollinshed, on the occasion of Queen Mary declaring war against Henry II of France by a herald-at-arms, that the war was brought to the knowledge of the English Nation by a proclamation of an equally solemn character. "In this season," (anno 1557,) writes the chronicler[25], "although the French King (as was said) was verie loth to have warres with England, yet the Queene (Mary) tangling herself contrarie to promise in her husband's quarrell, sent a defiance to the French King by Clarencieux King-of-armes; who comming to the citie of Remes, where the said King then laie, declared the same unto him the seventh of June, being the Mondaie in Whitsun-weeke. On the which daie, Carter and Norreie King-of-armes, accompanied with other heralds, and also the lord maire and certeine of the aldermen of the citie of London, by sound of three trumpets that rode before them, proclaimed open war against the said King, first in Cheapeside, and after in other parts of the citie, where customarilie such proclamations are made: the sheriffes still riding with the heralds till they had made an end, although the lord maior brake off in Cheapeside and went to St. Peter's to hear service, and after to Paules, where (according to the usage then) he went in procession." This record of the double fact of a Declaration of War abroad and of a Proclamation of War at home is the more curious, as it seems to have been the last occasion of any English Sovereign declaring war by a herald-at-arms.

Last British Declaration of War by a Herald-at-Arms.

There was no Declaration of War in the reign of Queen Elizabeth, on the occasion of the Expedition

[25] Hollinshed Chronicles, Vol. IV. p. 87.

of the Spanish Armada, although there was a State of War, after that event, between England and Spain. So likewise in the reign of Charles I, Lord Clarendon[26] narrates how Villars, Duke of Buckingham, "made war upon France without any colour of reason, or so much as the formality of a Declaration from the King, containing the ground and provocation and end of it, according to custom and obligation in the like cases, for it was observed that the Manifesto which was published was in the Duke's own name, who went admiral and general of the Expedition."

Last Declaration of War by a Herald-at Arms in 1657.

The practice, however, of declaring war by a herald-at-arms had not entirely passed away on the continent of Europe in the early part of the seventeenth century; for we find it told by the historian of the reign of Louis XIV, that Louis XIII still clung to the ancient rule, and sent a herald-at-arms to Brussels, in 1635, to declare war against Spain[27]. This is cited by many writers as the last known instance of the kind; but there appears to have been one later instance in 1657, when Sweden declared war against Denmark[28] by a herald-at-arms sent to Copenhagen.

Printed Declarations of War in the reign of Charles II.

§ 33. It appears from a passage in Chief-Justice Hale's "Pleas of the Crown"[29], that in the reign of Charles II the solemn form of declaring war then in use was by a printed declaration, such as that monarch issued against the Dutch in 1671. The institution of permanent embassies resident in the capital cities of Europe, which dates from the ministry of Cardinal Richelieu, could not but

[26] Clarendon's History, Vol. I. p. 71. ed. Oxford 1826.

[27] Voltaire Siècle de Louis XIV. c. 11.

[28] Marten's Précis, L. VIII. § 267. Holberg Danmarks Rige's Hist. Tom. III. p. 241.

[29] Pleas of the Crown. I. p. 162.

tend very much to modify the earlier forms of international intercourse, more particularly in regard to the course of proceedings introductory to war. Further, during the Thirty Years' War, the Law of Nations underwent a rapid development, for the stormy conflicts resulting from the union of religious with political antipathies consequent on the Reformation, and which had been confined in the sixteenth century to single states, convulsed the entire political system of Europe in the seventeenth century, and the Northern Powers of Europe came to take a part in the disputes of Central and Southern Europe. War, therefore, whenever it broke forth, was attended by more general consequences; and hence it became expedient for Nations which were about to become belligerents to give notice of their intention to other Nations, so that the latter might, if they did not side with either party, know from what period they should observe the duties of neutrality. Hence originated a practice for a belligerent Nation[30] to issue Manifestoes to other Nations, to make known the fact that it had taken up arms. Grotius speaks of this as an established practice in his time; and Vattel considers that a belligerent Power is bound to publish a Manifesto to neutral Powers, in order to obviate all difficulties that may otherwise arise from the subjects of the latter Powers carrying to a belligerent any supplies in the nature of contraband of war[31], and so incurring the penalty of their confiscation, if captured by his adversary.

Manifestoes of War to Neutral Nations.

30 Et has ob causas solent a bellum gerentibus publicæ significationes fieri ad alios populos, tum ut de jure causæ, tum etiam ut de spe probabili juris exequendi appareat. Grotius, L. III. c. 1. § v. 4.

31 L. III. c. 2. § 64.

§ 34. It is usual for a Nation which contemplates the necessity of making war upon another Nation to apprize the other Nation of its sense of an injury having been inflicted upon it or of a right having been denied to it through the medium of its Resident Envoy; and if no satisfaction should be offered, to recall its Resident Mission. This step, however, although it may imply the cessation of friendly relations, does not necessarily constitute a state of war between two Nations[32]. A Nation may even go further, and authorise reprisals to be made against another Nation; and if no other step should be taken on either side, the persons and property seized by way of reprisals may be detained as pledges for satisfaction without any war necessarily resulting thereupon. Thus, in 1739, on occasion of Spain having failed to pay a sum of money within a certain time specified in a treaty between the Crowns of Spain and of England, the King of England granted letters of marque and reprisal against Spain, and Mr. Keene, the British Minister at Madrid, was instructed to declare to the Court of Spain that his master, although he had permitted his subjects to make reprisals, would not be understood to have broken the peace, and that this permission would be recalled as soon as his Catholic Majesty should be disposed to make the satisfaction which had been so justly demanded. His Catholic Majesty, however, having ordered all the British ships in the harbour of Spain to be seized and detained, the King of England would keep measures with him no longer, but denounced war against him[33].

Recall of Resident Envoys.

[32] Thus France and Great Britain recalled their Diplomatic Envoys from Naples in 1859, but war did not thereupon ensue.

[33] Smollett's History of England, Vol. III. p. 27.

In such a case as this, a right of hostilities, as between the two Nations, accrued to England at once upon the original breach of a treaty on the part of Spain; but the exercise of that right was suspended[34]. The character of the acts of reprisal continued to be ambiguous, until war was declared. After war had been once declared, it reflected back upon the original breach of a treaty an undoubted character of hostility, and the property seized by way of reprisal became subject to condemnation, as the property of enemies *ab initio*[35].

Disuse of Formal Declarations of War.

§ 35. It may be taken to be the established practice of European Nations, since the peace of Paris (anno 1763), to dispense with any formal Declaration of War between the parties, and to attach all the legitimate consequences of war to a state of hostilities, which has been duly recognised and explicitly announced by a domestic Manifesto or State paper. The last occasion on which England had recourse to a formal Declaration of War was on 2 January 1762, when she declared war against Spain, and by that Declaration authorised and required all the King's subjects to do and execute acts of hostility against the King of Spain, his vassals and subjects, whilst she also advertised all

34 From a letter addressed by Lord Chancellor Thurlow to the King's Advocate General, on 12 December 1778, a MS. copy of which is in the author's possession, it appears that there had been six declarations of war on the part of the King of England since the Revolution of 1688; namely, that of 7 May 1689, against France; 4 May 1702, against France and Spain; 16 Dec. 1718, against Spain; 19 October 1739, against Spain; 17 May 1756, against France; 2 May 1762, against Spain.

35 Upon this principle England refused to restore to France at the Peace of Paris (anno 1763) the captures made by her fleets before the declaration of war in 1756, on the ground that the right of hostilities did not result from a formal declaration of war, but from the hostilities which the aggressor first offered. Ann. Register, anno 1760, p. 263.

other persons, of what Nation soever, not to transport or carry any soldiers, arms, powder, ammunition, or other contraband goods, to any of the territories or dependencies of the King of Spain. On the occasion of the next following war between England and France, in 1778, the first public act of the British Government was to recall its ambassador from Paris, and to lay an embargo upon all French vessels in British ports, immediately upon receiving a declaration[36] in writing from the French ambassador in London, that the French King had entered into a treaty of friendship and commerce with the United States of North America, "as a body of States, which had been in the full possession of independence since 4 July 1776," and that he was prepared to maintain effectively his treaty rights and the honour of his flag. France thereupon recalled her ambassador from the Court of St. James, and the French Mediterranean fleet having sailed to North America, a series of engagements took place between French and English vessels, although no Declaration of War had been issued on either side. Meanwhile the British Channel fleet, under Admiral Keppel, came into collision with some French frigates, and the two Nations drifted into open war. The occasion of this war was somewhat exceptional, being the first instance of an Established Power recognising formally the independence of the revolted subjects of another Established Power with which it was at peace, and at the same time, when it announced its recognition of their independence, declaring that

[36] This Declaration of 15 March 1778 was delivered by the Marquis de Noailles, the Ambassador of France in London, to Lord Weymouth, the British Secretary of State for Foreign Affairs. It will be found in the Nouvelles Causes Célèbres du Droit des Gens, par le Baron Ch. de Martens, Tom. I. p. 406.

it had entered into a treaty of friendship and commerce with them, and was determined effectively to protect its subjects in the enjoyment of their treaty privileges. England, under these circumstances, considered that the conduct of the French King was not merely an act of aggression against her, but a violation of the Law of Nations; and consequently that she was entitled to resent it, and make prize of French vessels, without any necessity of formally declaring war against France. That the British Government so determined to act after mature deliberation may be gathered from a letter of Lord Chancellor Thurlow's[37], in which he discusses the precedents of a Declaration of War. "I find a doubt hath been started whether it be correct to make prize or to condemn it as confiscate, and still more to distribute it to the captors, before a Declaration of War. Upon the last it is insisted, that the goods of Nations, not declared Enemies, can at most be taken as Reprisal, and detained only as pledges for satisfaction. It is said that this was done in 1754, and that no Prizes were actually condemned or distributed before Declaration of War at that period. Declaration is said to be necessary to what writers call a Solemn War, but it has been the practice of Nations in all ages to begin hostilities otherwise. What the Supreme Power of any other country may do, the King here has been in the use of doing in the matter of War against strange Nations. Therefore if you could, without trouble to yourself, order a search, I should be extremely

Letter of Lord Chancellor Thurlow, in 1778.

37 Letter of Lord Chancellor Thurlow to Philip Stephens, Esq. Secretary of the Admiralty, dated 12 August 1778, a copy of which exists in a MS. volume in the possession of the author, and formerly belonging to Sir James Marriott, the King's Advocate General.

happy to find what the course has been, especially since the Revolution in this respect, in giving orders to King's ships to take prizes, in granting commissions to Privateers, Letters of Marque and Reprisal, in proclaiming such purposes, in distributing Prizes to Captors, antecedent to Declaration of War."

Object of Proclamations of War at home.

§ 36. The object of a Proclamation of War, in the sense in which that expression is used to signify a public announcement of hostilities on the part of a Sovereign Power for the information and direction of its Subjects, as distinguished from a direct notification of hostilities made to the State against which war is to be carried on, is to fix the date from which special duties attach to the Subjects of the Belligerent Power as regards the Enemy. After war has been proclaimed, no pacific relations of whatever nature can be entertained between the respective Subjects of the belligerent Powers, except under license or convention, All trade is suspended, no contracts are legal, no debts can be enforced, and no suits can be sustained by or against an enemy before the municipal tribunals of either State. Ex natura belli commercia inter hostes cessare non est dubitandum, is the language of Bynkershoek[38], and Valin treats it as a question beyond all dispute in his time. But there is no absolute necessity that there should have been a Proclamation of War in order to establish the legal quality of alien enemy against a Subject of a Foreign Power. In the reign of Queen Elizabeth it was held to be sufficient to show that there was a State of War in fact between the Crown of England and Spain, and that the Spaniards were actual enemies of the Queen,

[38] Quæst. Jur. Publici, L. I. c. 11.

in order to disable a Spanish Subject from suing a British Subject in a British court in an action of debt. So likewise in France it was ruled by a court of competent jurisdiction, on 13 May 1757, that there was a State of War between France and England on 29 October 1755, by reason of the acts of hostility committed by English cruisers against French vessels, although war was not declared by England before 17 May 1756[39]. So likewise the war between the United States of America and Mexico, in 1846, was commenced by a conflict of armed forces in the disputed territory, and without any declaration on either side; and the Congress of the United States passed an Act subsequently recognising the existence of the war[40]. A State of War may thus exist between two countries as respects the mutual rights and obligations of the citizens of each country in relation to one another, without any proclamation or indication thereof, or other formal matter of record to prove its commencement.

§ 37. It has been observed that the right of hostilities, as between two belligerent Nations, does not result from any formal Declaration of War, but from the aggression of one Nation upon the independence of the other. The obligation of neutrality, on the other hand, as between the respective belligerents and other Nations, does not arise, except upon notification from one or other belligerent that he is at war with his adversary. A Nation is bound to bring to the knowledge of other Nations, with which it is at amity, the fact of its being obliged to take up arms to maintain its rights against

39 Hale's Pleas of the Crown, I. p. 162. Valin Commentaire sur l'Ordonnance de la Marine, L. III. Tit. VI. § 3. p. 457. Ed. 1829.

40 Halleck's International Law. San Francisco, 1861. p. 354.

another Nation, so that they may take measures to warn their citizens to observe the duties of neutrality. For this purpose Manifestoes are usually published by the belligerent Powers at the commencement of the war, which set forth the grounds upon which they feel justified in taking up arms. After that a Manifesto, which always implies, if it does not in terms contain, a declaration of war, has been circulated by the diplomatic Envoys of the belligerent State at the Courts of the various Neutral Powers, it will be no longer competent for the Subjects of those Powers to plead their ignorance of a State of War between the belligerents. A Manifesto may be regarded as an Appeal or Protest addressed by an injured Nation[41] to the Community of Nations. It ought to set forth in dignified language the cause of complaint and the efforts to obtain redress;—it should speak with a certain reserve of the injuries which the Nation has undergone, and with a certain moderation of the satisfaction which it seeks for such injuries. It ought to set forth the facts without colour or animosity, and state the principles of Public Law, upon which it relies to maintain the justice of its cause. It should speak with respect of its adversary as its equal; and should avoid embittering the dispute by offensive expressions. In a word, it should avow regret that ancient friends should have become temporary adversaries, and express a hope of a sincere reconciliation after the

Object of Manifestoes to Neutral Powers.

[41] An "Exposé des motifs," or a "Mémoire Justificatif," as the case may be, is sometimes published; but this is a totally distinct paper from a Manifesto. The French Government published a paper under the former title in 1779, to which the English Government published an answer under the latter title, from the pen of the historian Gibbon. They will be found in Ch. de Martens. Nouvelles Causes Célèbres du Droit des Gens. I. p. 425 & 436.

dispute has been adjusted. "The Homeric heroes," says Vattel, "called each other before battle 'dog' and 'drunkard.'" The Emperors and Popes of the middle ages treated each other with as little delicacy. But we may congratulate our age on the superior gentleness and humanity of its manners, and not treat as vain politeness those courtesies which are productive of real and substantial effects[42].

Opinion of M. de Haute-feuille.

§ 38. Amongst modern publicists M. de Haute-feuille[43] stands alone in maintaining that war is not *regularly* commenced as regards the adverse Nation, except after a direct Declaration of War, although it may be *regularly* commenced in regard to Nations, which do not take part in the hostilities, after the diplomatic circulation of a Manifesto. He admits that Vattel and De Rayneval, who have maintained the necessity of a Declaration as contrasted with the looser doctrines of Bynkershoek, Klüber, and De Martens, allow that the diplomatic circulation of a Manifesto is in effect equivalent to a direct Declaration of War; but he persists in holding that war, and more particularly a maritime war, requires to be legalised by a special Declaration made to the adversary. Let it be considered for a moment to what conclusions this position leads. If the character of all acts committed before a Declaration of War is to be measured by the same standard which applies to a state of Peace, then acts of violence committed under such circumstances on the high seas will be acts of piracy, and those who have committed them may be treated as *hostes humani generis;* but no Courts of Admiralty in any country have ever ventured to pronounce the acts of parties, who are belligerents *de facto* before a Declaration of War, to be piratical acts. Further,

42 Heffter, § 121.

43 Des Droits et des Devoirs des Nations Neutres. Tit. III. c. 1. § 11. p. 139. ed. 1858.

A State of War *de facto*.

where there is a State of War *de facto* between parties, which cannot be preceded by a Declaration, as for instance in the extreme case of a Civil War, where part of a Nation has erected a distinct and separate government, the existence of a State of War, under such circumstances, is of necessity recognised by foreign Powers, although they may not have acknowledged the political independence of the new Government; and foreign Courts administering the Law of Nations have uniformly treated each party as a belligerent, in reference to all acts asserted by it to have been done *jure belli*. Thus the existence of a civil war between the people of Texas and the authorities and people of the other Mexican States was recognised by the President of the United States, in the month of November 1835. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican Government; and when the armed schooner Invincible, sailing under the flag of the newly constituted Republic of Texas, captured in the month of April 1836 the American brig Packet, on the alleged ground that she was laden with a cargo contraband of war, destined for the use of the Mexican army, the Attorney General of the United States formally advised the President, that the charge of Piracy against the crew of the Texian brig could not be sustained[44].

Texas and Mexico.

Burlamaqui's opinion.

Burlamaqui[45], on the other hand, maintains with more reason, both as regards the real object of a Declaration of War, and as regards the actual practice of Nations, that "the formalities observed by different Nations in Declarations of War are arbitrary.

44 Opinions of the Attorneys-General of the United States, Vol. II. p. 1066.

45 Droit Naturel, Pt. IV. c. 4.

It is immaterial what the form may be, so that the opposing Sovereign does not remain in ignorance of it." Thus, inasmuch as according to the Constitution of the United States of America, it belongs to the province of the Legislative as distinguished from the Executive Government to declare war, a war cannot be regularly commenced by the Federal Union without an Act of Congress. The passing of such an Act by Congress is accordingly held by the United States to be a formal official notice to all the world, which is entitled to the same international respect as is paid to a Declaration of War, or a Manifesto, when it falls within the proper province of the Executive Government of a Monarchical State to issue such documents. Accordingly the United States commenced active hostilities against Great Britain in 1812[46], as soon as the Act of Congress had been passed, without waiting to communicate to the British Government any notice of its intentions, and without issuing any Manifesto setting forth the motives for commencing war.

Practice of the United States of America.

§ 39. It is undoubtedly of importance that there should be a well defined boundary line to mark the commencement of a State of War between two Nations, so that those acts which are to be considered as the effects of war may be readily distinguished from those which each Nation is entitled to regard as injuries, and for which reparation may be demanded, when terms of Peace have to be settled. But it is not always easy, as a matter of fact, to draw such a line. As long as it was the practice for a Nation to make a formal Declaration of War before commencing active hostilities, nothing was more easy than to draw a line between acts done before and acts done after the Declaration of War;

[46] Kent's Commentaries, Vol. I. § 55.

and it was not unusual to stipulate in Treaties of Peace that all places and property seized before the Declaration of War[47] should be restored. The *Status ante bellum* would, in such a case, be satisfied by returning to the state of possession before war had been declared. But after Nations came to engage in active hostilities before either of them had made any formal Declaration of War, the *Status ante bellum* would not be secured by stipulating that matters should be replaced in the state in which they were before war was declared. Thus the war between Great Britain and France, which was terminated by the Peace of Aix-la-Chapelle, may be said to have commenced with the battle of Dettingen, on 26 June 1743, which was fought between the French and English armies, the latter being commanded by the King in person, or at least by the sea fight on 9 February 1744, off Toulon, between the English fleet and the combined French and Spanish fleets. Yet no Declaration of War was made by France before 20 March 1744, nor by England until 29 March 1744, when she issued a Counter-Declaration of War. Accordingly we find that it was stipulated in the treaty of Aix-la-Chapelle[48] (18 October 1748) that "all conquests made since the *commencement of the present war*[49] shall be restored, as well in Europe as in the East and West Indies, in the state in which they are at present." Under such an agreement the *Status ante bellum* would only be satisfied by either party giving up all its conquests.

The Status ante bellum ambiguous.

47 Ante denuntiationem belli. Treaty of Utrecht, between Great Britain and Spain, anno 1713. Art. VIII. Schmauss. Corp. Jur. Gent. Acad. p. 1421.

48 Wenck. Codex Jur. Gent. Vol. II. p. 325.

49 Vattel has fallen into an inaccuracy in speaking of this provision of the treaty of Aix-la-Chapelle, as if it referred to all prizes made before the declaration of war. L. III. § 56.

§ 40. When one Nation declares war against another Nation, writes Grotius, the Declaration becomes reciprocal[50]. Upon this principle Lord Stowell held that a Declaration of War on the part of Sweden against Great Britain was not a mere challenge on its part to be accepted or refused by the other country, but proved the existence of actual hostilities on one side at least, and put the other party also into a State of War, although it might think proper to act on the defensive only[51]. Cases have occurred in which a hostile demonstration has been held to amount to a virtual declaration of war, and to be a justification for having recourse to arms without any formal Declaration of War.

Unilateral Declaration of War sanctions reciprocal hostilities.

Such seems to have been the justification under which the British fleet, commanded by Admiral Byng, on 11 August 1718, destroyed the Spanish fleet at Passaro. The English ambassador at Madrid had previously warned the Spanish Prime Minister, Cardinal Alberoni, that if the threatened invasion of Sicily was not abandoned, England would oppose Spain with all her power, and had communicated to him the orders, which the English Admiral had received, to hinder and obstruct the invasion. Alberoni in reply sent a note to the effect, that the English Admiral might execute the orders, which he had received from the King his master. In this case, if the English Admiral had waited for his Government to issue a formal Declaration of War, Spain would have been enabled to destroy the ally, whom the English fleet had been sent to protect. The necessity, therefore, of the case sanctioned immediate action, but the answer itself of Alberoni, in accepting

[50] L. III. c. 3. § vii. 2.

[51] The "Eliza Anne." 1 Dodson, 247. "The Nayade," 4 Robinson, p. 253.

the alternative, might be regarded as a virtual declaration of war. War was in fact commenced from the battle of Passaro, although England did not formally declare war against Spain until December 17, 1718; but when the treaty of[52] Madrid (June 31, 1721) came to be negotiated, it was provided that all the vessels and effects seized by either Spain or England, either before or after the Declaration of War, should be restored.

Recall or Dismissal of resident Envoys.

§ 41. The recall or dismissal of a resident Envoy is generally considered as equivalent to a declaration of war, although we find occasional instances where friendly relations have been suspended by that event, without war resulting therefrom. In certain treaties of commerce provision has been made that a rupture of peaceful relations shall not be held to exist, until after the recall or dismissal of the respective Envoys or Ministers of the contracting parties. Such a provision is found in the Treaty of Rio Janeiro[53], between Great Britain and Portugal; and in the Treaty of Rio Janeiro, between Great Britain and Brazil[54]; and in Treaties concluded between Brazil and France in 1826, Brazil and Prussia in 1827, and Brazil and Denmark in 1828. "If there should arise any misunderstanding, breach of friendship, or rupture, between the two Crowns (which God forbid), the rupture shall not be deemed to exist until after the recall or departure of their respective diplomatic agents," is the provision which is found in these treaties. This is a very wise and reasonable arrangement, which if it should be ever generally adopted, would prevent all

Treaties.

[52] Schmauss, Corpus Jur. Gent. Academicum, p. 2143.

[53] Treaty of Commerce between Great Britain and Portugal, 19th February 1816. Art. XXXI. Martens, N. R. III. p. 213.

[54] Treaty of 17 August 1827. Martens, N. R. VII. p. 479.

disputes and difficulties as to the true date of the legal commencement of War. As War puts an end to all amicable intercourse between the Subjects of the belligerent Powers, and abrogates all antecedent treaty engagements, it seems reasonable that its legal commencement should be marked by the formal cessation of amicable intercourse between the Governments. In the absence of any special treaty arrangements on this subject, the general rule as regards belligerents seems to be this, that a State of War may exist between them without any Declaration of War on either side. It may begin with mutual hostilities[55], and the legitimate consequences of war will ensue from the immediate commencement of such hostilities. But with regard to other Nations, they are not charged with the duties of neutrality until a State of War between the belligerents has been officially announced to them, or until they have otherwise acquired a positive knowledge of its existence. War may exist notoriously[56], in which case it is not competent for a neutral Power to refuse to recognise its existence. On the other hand if a third party is *bonâ fide* ignorant of the existence of a war between two other parties, there is no foundation in his case for the duties which the Law of Nations attaches to the Neutral Character, for he is unconscious that he has any occasion to act in that character. Under the circumstances of such *bonâ fide* ignorance of the existence of war between Great Britain and France, two Spanish vessels resisted the exercise of the right of visitation and search by a British cruiser[57]. Notwithstanding such resistance on

Ignorance of hostilities on the part of Neutrals.

55 Sir W. Scott in the "Eliza Anne." 1 Dodson, p. 247.

56 La Nuestra Senora de la Caridad. 4 Wheaton, p. 497.

57 The San Juan Baptista and La Purissima Conception. 5 Robinson, p. 34.

their part, which is in itself an offence of a very heinous character, Lord Stowell directed the Spanish vessels to be released, on the ground that the masters of them were unconscious that they had any neutral duties to perform.

CHAPTER III.

COMMENCEMENT OF WAR.

Effect of War upon individuals—Natural born and adopted citizens—Inhibition of intercourse with the enemy—Recall of natural born subjects—Commission to carry on hostilities—Enemy-subjects within the territory of a belligerent—Treaties of Commerce—Enemy-property within the territory of a belligerent—Milder practice in modern times—Obligation of good faith—Ancient practice of Provisional Embargo—Enemy-subjects resident in the territory of a belligent—Enemy-subjects *in transitu*—Detention of British subjects in France by the First Consul in 1803—Modern practice not to detain enemy-subjects—Debts due to enemy-subjects—Opinion of Mr. Justice Story, Mr. Chancellor Kent, Vattel, and Bynkershoek—Judgment of Lord Ellenborough, in Wolff *v.* Oxholm—Wheaton—Suspension of Commercial Contracts—Debts due to an Enemy-Sovereign—Conduct of Prussia in regard to the Silesian Loan—Conduct of Great Britain in regard to the Russian-Dutch Loan—Embargo of enemy-property afloat within the territory of a belligerent—Conduct of the Allied Powers at the commencement of the war against Russia in 1854—Russian reciprocity—Immovable property of enemy-subjects within the territory of a belligerent.

Effect of War upon individuals.

§ 42. A SOLEMN Declaration of War (*diffidatio*) purported to be a renunciation on the part of the Sovereign, who declared war, of all international obligations towards the Sovereign against whom war was declared, so that no peaceful relations of any kind could thenceforth be entertained between them, except under express convention. The existence of

mutual hostilities of such a nature, as to constitute *de facto* a State of War between two Sovereign Powers, is attended with analogous consequences in suspending all peaceful intercourse between the political communities, over which they are Sovereigns, and in constituting all the individual members of the one Nation enemies of the individual members of the other Nation. As Private War is inconsistent with Public Peace, so Private Peace cannot coexist with Public War. "In former times, and especially in small states," writes Vattel, "whenever war was declared, every man became a soldier; the entire people took up arms, and engaged in the war; after a short time a selection came to be made, and armies were formed of picked men, and the rest of the people continued to pursue their usual avocations. At present the use of regular troops is everywhere established, but principally in the great States. The Public Power raises soldiers, distributes them in different corps under the authority of chiefs and other officers, and keeps them on foot as long as it thinks necessary; as every citizen or subject is bound to serve the State, the Sovereign has a right to enroll those whom he pleases in case of necessity[1]." Accordingly as every member of a political community is under an equal obligation to serve and defend the State, as far as he is capable, no individual is exempt by the Law of Nations from taking up arms in its defence. It is, however, optional with every community to organise itself in the manner, which it thinks most convenient for its own defence in time of war. Hence the obligation of each individual member of a political community to take an active part in any war, in which the community is engaged, will depend upon the Constitutional Law of the community. Amongst some

[1] Vattel, Droit des Gens, L. II. c. 2. § 9.

nations there is a legal obligation upon every citizen under a certain age to serve the State in arms, and lot decides upon whom the actual burden of military duty shall devolve. Amongst other Nations the profession of arms is voluntary, like the profession of letters, with this difference however, that the Nation undertakes to pay those of its citizens who choose to enroll themselves in its standing army, as it is just that those who do not serve should pay their defenders. There have been on the other hand instances where Nations have been content to exempt their own citizens from active military service, and to entrust their defence to a regular army of foreign origin serving them for pay. Such were the Swiss regiments in the service of Spain and of Naples, and such were the Irish regiments in the service of the Emperor, and the Scotch regiments in the service of Sweden and of France. But in all such cases, if a soldier of foreign origin takes service in the standing army of a Nation, he becomes for the time of his service a member *de facto* of the Nation for all belligerent purposes. No person is entitled to object to his so taking service, but the Sovereign Prince to whom he owes similar service by virtue of his allegiance, as a natural born subject; and if he has entered into the military service of a foreign Power without the consent of his Sovereign, he will have offended indeed against the laws of his native country, and may disentitle himself to enjoy the privileges of a citizen, if he should return to that country. But by the Law of Nations every man is free to attach himself to any political community which may be disposed to admit him to membership, if he finds it to be for his advantage[2]. He may make its cause his own, and espouse its quarrels;

[2] Vattel, L. III. c. 2. § 13.

but the act must be his own voluntary act. If a person accordingly voluntarily quits his native country, and seeks service with a foreign Prince, it is no violation of the Law of Nations, if the Prince should engage him in his service without the previous consent of the Sovereign to whom he owes natural allegiance. But it would be a violation of the Law of Nations for a foreign Power to enlist soldiers within the territory of another State, without the permission of the Sovereign of that State; and if at any time a foreign Power has been guilty of such an act, it has been held a sufficient cause for a declaration of war against it, unless it should have made suitable reparation.

Natural born and adopted citizens.

§ 43. When a Nation is at war with another Nation, all the members of the one Nation are the enemies of the other Nation. This rule of joint association in war applies to adopted citizens, equally as to natural born citizens. "Without doubt," says Grotius, "all the subjects of the Sovereign, from whom an injury has been received, who are such for a permanent cause, are liable to the law of reprisals, whether they be natives or citizens[3]." The same rule applies likewise to all persons who come to reside within the country of a belligerent Power with the knowledge of the existence of war, equally as to all who have come into the country before the war, and continue to reside there after the commencement of hostilities for a longer time than is necessary for their convenient departure. "Without doubt," writes Grotius[4], "strangers who come into an Enemy's country after a war has been begun and is known to exist, may be treated as enemies, and those, who have gone thither before the war has commenced, may by the Law of Nations be taken for enemies after a moderate

3 De Jure B. et P. L. III. c. 2. § vii. 2.

4 De Jure B. et P. L. III. c. 4. § vi. vii.

time, within which they should depart." All such persons are *de facto* subjects of the Enemy-Sovereign, being resident within his territory, and are adhering to the Enemy, so long as they remain within his territory. If they, however, quit the Enemy's territory with the intention of abandoning it, and resuming a permanent residence in the country of their origin, they divest themselves of the enemy-character at once, upon so quitting the Enemy's territory. It is otherwise, however, with the natural born subjects of an Enemy-Sovereign; they may be treated as enemies by the other belligerent wherever he may find them, except they should be within neutral territory, in which case it is the privilege of the neutral Sovereign to prohibit all violence being offered to them. The neutral Sovereign has a right to insist that all persons within his dominions, who may have differences to settle, shall settle them in his courts by a judicial proceeding and not by violence. Thus Demophoon is represented as saying to the ambassador of Eurysthenes,

> "If you can charge these guests with an offence,
> You shall have justice, but not drag them hence [5]."

§ 44. It is customary for the Government of a country, at the commencement of a war, to issue an edict or proclamation, whereby it notifies to its Subjects the particular line of conduct which they are to pursue in regard to the Enemy. These edicts for the most part have reference to commerce and to personal intercourse of an amicable character, which it is usual to inhibit except it be carried on under special licenses or cartels. It is competent also for a belligerent Sovereign, at the commencement of a war, to recall all his natural born Subjects, who may be in the service either of the Enemy or of any neutral Power, in order

Inhibition of intercourse with the enemy.

5 Euripidis Heraclidæ, 251, 252.

Recall of natural born subjects.

that they may take their share of duty in defending their native country. Edicts of both kinds, termed Edicta inhibitoria and Edicta avocatoria[6], were issued by the Roman Emperor of the Germans in 1792 and in 1793[7]; and a long series of Edicts of the latter kind, extending over a period of a century and a half (1548 to 1704), have been preserved in the Codex Augusteus Saxonicus Electoralis, 2310—2367[8]. The more usual course in the present day is for a Sovereign Prince not to recall his natural born Subjects, who may be resident in an Enemy's country at the commencement of a war, but to leave them free to remain, if they please, in their adopted country, subject however to the inconvenience of being regarded and treated as enemies, so long as the war may last.

§ 45. When a Nation takes up arms against another Nation, it declares itself from that time an Enemy to all the individual members of the latter, and authorises them to treat it as such. If therefore regard be had to the Natural Law of Nations, it would appear that as soon as two Nations are engaged in war, all the Subjects of the one may commit hostilities against the Subjects of the other, and do them all the damage which is authorised by the practice of Nations towards Enemies. The ancient Declarations of War were couched in language of the most general character, under which every Subject of the belligerent Sovereign was commanded to attack the Enemy, *courir sus aux ennemis.* But the milder practice of the Christian States of Europe has confined the duty of undertaking active hostilities against the Enemy to the commissioned officers

Commissions to carry on hostilities.

[6] The "Jus avocandi cives ex alieno territorio" has been discussed by various writers, cited in Kamptz Neue Literatur des Volkerrechts. § 277.

[7] Von Martens, § 269.

[8] Klüber, § 240.

of the State, and soldiers or sailors serving under them. "The necessity of a special order to act," says Vattel[9], "is so thoroughly recognised, that even after a Declaration of War has been made, if the country people of themselves commit hostilities, the Enemy treats them without any regard, and causes them to be hung like so many robbers or brigands[10]. The same course is pursued with respect to privateers at sea. A commission from their Sovereign or his admiral can alone, in case they are captured, ensure them such treatment, as is shown to prisoners taken in regular warfare." We find, accordingly, that the phraseology of modern Declarations of War has been modified agreeably to a milder practice. Thus the last formal Declaration of War on the part of Great Britain, which was issued on 2 January 1762, against Spain, ran in this form: "We will and require our Generals and Commanders of our forces, our Commissioners for executing the office of our High Admiral of Great Britain, our Lieutenants of our several countries, Governors of our forts and garrisons, and all other officers and soldiers under them by sea and land, to do and execute all acts of hostility in the prosecution of this war against the king of Spain, his vassals, and subjects, and to oppose their attempts, willing and requiring all our subjects to take notice of the same, whom we henceforth strictly forbid to hold any correspondence or communication with the said king of Spain or his subjects." Vattel holds that, where the ancient form of language is retained in modern Declarations of War, Custom will control its interpretation. The general order embodied in such Declarations authorises indeed, and even obliges every Subject of

9 Droit des Gens. L. III. § 226.
10 Martens, Précis, § 271. Klüber, § 246.

whatever rank, to arrest the person and property of the Enemy, when they fall into his hand; but it does not invite any Subject to undertake any offensive expedition without a commission or special order[11].

Enemy-subject within the territory of a belligerent.

§ 46. After hostilities have been once commenced, the persons of enemies are liable to detention, and their property to confiscation, if they are within the territory of a belligerent Power. The Roman Law was extremely harsh in this particular, for we find it to have been considered to be settled law in the time of the Emperor Justinian[12], that the citizens of a country, who had gone to another country in time of peace, became slaves, if war broke out between the two countries, and they were seized within the enemy's territory. "According to strict authority," writes Chancellor Kent, "a State has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war[13]." Grotius holds that such persons can only be detained as prisoners of war until the termination of hostilities, on the ground that it is justifiable to weaken the power of the Enemy by detaining his Subjects whilst war continues; but upon the termination of hostilities, there can be no reasonable objection to their being set free, as they cannot be conceived to have done anything wrong[14]. Bynkershoek, whilst admitting

[11] Droit des Gens. L. III. § 227. Heffter, § 124.

[12] Dig. XLIX. Lib. XV. § 12. Verum in pace qui pervenerunt ad alteros, si bellum subito exarsisset, eorum servi efficiuntur, apud quos jam hostes suo facto deprehenduntur.

[13] Kent's Commentaries, L. I. § 56.

[14] In pace postliminium, nisi aliter convenerit, est his qui non virtute bellica superati, sed fato suo deprehensi sunt, ut qui, cum bellum subito exarsit, apud hostes reperiuntur. L. III. c. 9. § iv. 1. At de his qui bello exorto deprehensi erant, dici idem non poterat, nam in illis nullum injuriæ consilium fingi poterat. Tamen ad minuendas hostium vires retineri eos manente bello

the Right of a belligerent Power to seize and detain enemy-subjects, who may be within his territory at the commencement of war, speaks of that Right as being rarely exercised in his days[15]. "Captura autem quamvis apud Romanos etiam exercita sit adversus eos, qui tempore belli exoriuntis in alterius imperio inveniebantur, hodie, quamvis exerceri possit, raro tamen exercetur." Bynkershoek considers that the exhibition of forbearance in regard to enemy-subjects, under such circumstances, is a concession to humanity, unless it should have been a matter of treaty-stipulation; and that wherever there are treaty-stipulations, whereby an interval of time is secured to the Subjects of a belligerent Power to enable them to withdraw themselves and their property in safety out of the Enemy's territory, they will rightly be made prisoners of war, and their property confiscated, if they should not have withdrawn themselves from the Enemy's territory within the time specified by treaty.

Treaties of Commerce.

§ 47. There are writers of eminence on the other hand, who have maintained that the series of treaties, which stipulate for the allowance of a reasonable time after the outbreak of war for the Subjects of a belligerent Power to withdraw their persons and property out of the territory of an Enemy, are but affirmations of Common Right or Public European Law. Thus Emérigon in commenting upon various modern treaties of commerce, and amongst others upon the treaty concluded between France and the United States of America (5 Feb. 1778), whereby it was provided that in case of war breaking out between the two Nations, an

non iniquum videbatur; bello autem composito nihil obtendi poterat, quominus demitterentur. Itaque consensum in hoc est, ut tales in pace semper libertatem obtinerent, ut confessione partium innocentes. Ibid. § iv. 3.

[15] Quæst. Jur. Publici, L. I. c. 3.

Enemy-property within the territory of a belligerent.

interval of six months after the Declaration of War should be allowed to the merchants of either Nation, in the towns or cities which they inhabit, to collect and transport their merchandise; and that if they should suffer any damage or injury in the meanwhile at the hand of the citizens or subjects of either of the contracting parties, they should have full and entire satisfaction[16]—"observes that such treaties are nothing more than declaratory of the Common Law. In effect," he says, "He, who relying on the public faith, comes amongst us to trade, or for other lawful cause, is not to be treated as an enemy, simply because war breaks out between his Nation and our own." Vattel to the same effect says, "The Sovereign declaring war can neither detain the persons nor the property of those subjects of the Enemy, who are within his dominions at the time of the declaration. They come into his country under the public faith. By permitting them to enter and reside in his dominions, he tacitly promised them full liberty and security for their return. He is therefore bound to allow them a reasonable time for withdrawing with their effects: and if they stay beyond the term prescribed, he has a right to treat them as enemies—as unarmed enemies, however. But if they are detained by an insurmountable impediment, or by sickness, he must necessarily, and for the same reasons, grant them a sufficient extension of the term. At present, so far from being wanting in this duty, Sovereigns carry their attention to humanity still further; so that foreigners, who are subjects of the State against which war is declared, are very

16 Martens Recueil, II. p. 592. Afin de promouvoir d'autant mieux le commerce des deux côtés, il est convenu que, dans le cas où la guerre surviendrait entre les deux nations sus-dites, il sera accordé six mois après la déclaration de guerre aux merchands dans les villes et cités qu' ils habitent, pour rassembler et transporter leurs merchandises. Art. XX.

frequently allowed full time for the settlement of their affairs. This practice is observed more especially with regard to merchants, and care is moreover taken to provide for their case in commercial treaties. The king of England has done more than this. In his last Declaration of War against France, he ordered that all Frenchmen, who were in his dominions, might remain there in perfect security in regard both to their persons and their property, provided they demeaned themselves dutifully[17]." Vattel's observation is applicable also to the next following formal Declaration of War made by England (2 Jan. 1762), against Spain; the concluding paragraph of which was to this effect: "And whereas there may be remaining in our kingdom divers of the subjects of the king of Spain, we do hereby declare our Royal intention to be that all the Spanish subjects, who shall demean themselves dutifully towards us, shall be safe in their persons and effects[18]."

§ 48. If the observations of Emérigon and Vattel are limited to the natural born subjects of an Enemy, who have established themselves for the purposes of trade in the country of a belligerent Power before the breaking out of war, much may be said in favour of their view, that such parties cannot be at once treated as enemies by the belligerent Power with due regard to good faith. They are clearly distinguishable from natural born subjects of the Enemy, who are within the jurisdiction of the belligerent Power at the commencement of a war casually as visitors for the purpose of

Obligation of good faith.

[17] Droit des Gens, L. III. c. 4. § 63. Vattel published his work in 1758, he is therefore referring to the English Declaration of War against France of 17 May 1756.

[18] This Declaration of War against Spain is set forth at length in the appendix of Dr. Pratt's edition of Mr. Justice Story's Notes on the Principles and Practice of the Prize Courts. London, 1854.

trade or pleasure. A foreigner who has established a house of trade in the country of a belligerent Power, has given security as it were for his good behaviour, and is contributing by his industry and capital to promote the welfare of the country which he inhabits, equally with its natural born citizens. The Government of the country, on the other hand, having permitted him to establish himself under its jurisdiction by the side of its natural born subjects, must be taken to have accorded its protection to him, as an adopted subject, equally as to its native subjects. It is obvious therefore that the personal relations of such an individual to the Sovereign of the country in which he has established himself, are substantially different from the personal relations of foreigners *in transitu:* and that there is a tacit contract between him and the Sovereign, that as long as he obeys his laws, the latter will accord to him his protection ; but his relations of strict Right (*stricti juris*) towards the Sovereign of the country in which he has established himself, will be determined by the Territorial Law, of which he was bound to inform himself, when he first established himself in the country. The Territorial Law of every Nation, for instance, prescribes for the most part certain conditions, under which a foreigner may become a naturalised subject or citizen, and as such have within its territory all the rights and privileges of a natural born subject in time of war, equally as in time of peace. But if a foreigner, resident within the territory of any particular Nation, should not have been naturalised in conformity with the requirements of its Territorial Law, his *personal status* will continue to be that of an alien, and if war should arise between his native country and the country in which he has established himself, his personal relation with the latter country will be that of an alien enemy. An indepen-

dent Power under such circumstances will be justified in case of war, in the exercise of its *strict Right*, to order him, with all other alien enemies, to quit its dominions, although he may have established himself therein *bona fide* for purposes of trade, and have acquired a commercial domicile under the Law of Nations. But in exercising his strict Right, a belligerent Sovereign must observe good faith towards such persons, and allow them a reasonable interval of time to collect and transport their goods and effects. It would be inconsistent altogether with good faith to treat them in a summary manner as enemies, unless the public safety imperatively required it,—as, for instance, if they should be in league with the Enemy, and be preparing to co-operate with an invading army. In such a case there would be bad faith on their part, and the Sovereign of the country might at once exercise his extreme Right, as a belligerent, against them with perfect good faith on his part.

§ 49. It may be affirmed, that there is now a long established Practice amongst the Christian Powers of Europe, from which it would be an immoral act for any of them to depart without notice, to refrain from seizing the effects of alien merchants, who are resident for purposes of trade within their territory at the time when war breaks out. It was one of the provisions of the Great Charter of King John (15 June 1215), that "all merchants (unless publicly prohibited beforehand) might have safe conduct to depart from, to come into, to tarry in and go through England for the exercise of merchandise, without any unreasonable impost, except in time of war; and that upon the breaking out of war with their Nation they should be attached (if in England) without harm of body or goods, until the King or his great Justiciary be informed how English merchants are treated in

the Enemy's country; and if English merchants are secure, then the enemy merchants should have the same security[19]." The early practice of England would thus appear to have been to *embargo* enemy merchants at the commencement of the war, and to release them subsequently on conditions of reciprocity being observed. Such also seems to have been the practice of the Scandinavian Nations[20]; and a passage in Matthew Paris seems to show that it had been the ancient practice of the kings of France not to seize the persons or goods of enemy merchants, who were resident within their dominions when war broke out, as he censures the conduct of Louis IX. of France in 1242, in arresting the persons and goods of the English merchants trading within the kingdom upon the breaking out of war, as contrary to duty and derogatory to the ancient dignity of the kingdom. Henry III. of England, on hearing of the king of France's severity, immediately retaliated by reprisals against the persons of French merchants resident in England[21].

Ancient practice of Provisional Embargo.

Whatever may have been the practice of France in the thirteenth century, it seems probable that the interests of international commerce had not at that period given rise to any fixed rule amongst Nations. But we find in the middle of the fourteenth century (A.D. 1354), that it was an express provision of the Law of England, that foreign merchants residing

[19] Blackstone's Commentaries, Vol. I. p. 260.

[20] Stiernhook de Jure Sueon, L. III. c. 4.

[21] Rex Francorum mercatorum Angliæ corpora cum suis bonis, per regnum negotiantium, secus quam decuit, capi feraliter imperavit, lædens enormiter in hoc facto antiquam Galliæ dignitatem. Cum autem hujus protervitatis infamia aures et cor Regis Angliæ tetigisset, jussit similiter ut per regnum Anglorum mercatores regni Galliæ subirent merito talionem. Matth. Paris, Hist. p. 485.

in England[22], when war broke out, should have convenient warning of forty days, by proclamation, to depart the realm with their goods; and if by reason of accident they should be prevented from so doing, they were to be allowed forty other days to pass with their merchandise, with liberty to sell the same. The example of England in this matter was soon afterwards followed by King Charles V. of France, when he issued an ordinance declaring that foreign merchants who should be trading in France at the time of the Declaration of War, should have nothing to fear, for they should have liberty to depart freely with their effects[23].

Enemy-subjects resident in the territory of a belligerent.

§ 50. In the fifteenth century the importance of international commerce began to be generally appreciated by Governments, more particularly as the Confederation of the Hanse Towns gave great political weight to mercantile interests; and we find accordingly a treaty concluded between the Hanse Towns and Louis XI. of France (anno 1483) under which merchants of the Hanse Confederation were to be at liberty to remain in the French dominions for one year after war broke out, with protection of persons and goods. In the next century it came to be a common stipulation in treaties of commerce, that a period of time, varying from three months to two years[24], should be allowed to the subjects of the contracting parties after war should have been declared, to withdraw themselves and their goods and effects in safety from the enemy's country. France seems to have been eminently the leading Power in entering into such treaties[25]. Thus we find a treaty concluded

[22] Statute of Staples, 27 Ed. III. c. 17.

[23] Hérault, Abrégé Chronologique de l'Histoire de la France, L. I. p. 338.

[24] Dumont, Corps Diplom. L. III. p. 23.

[25] In the treaty between Por-

in 1662 between France and the States General of the United Provinces, under which an interval of six months was to be allowed to the subjects of either of the contracting parties, if war should arise between them, to withdraw with their goods and effects from the Enemy's country. A treaty in like terms was concluded not long afterwards, between England and the States General (31 July 1667). Where there were no such treaty engagements, all that good faith could require was, that a reasonable time should be allowed for merchants to withdraw from an Enemy's country. We find accordingly that Louis XIV. of France, in declaring war against England on 26 January 1666, being under no treaty engagements without that Power to allow any definite time to English merchants to withdraw from his dominions, issued nevertheless a Proclamation (1 Feb. 1666), to the effect that "his Declaration of War was not intended to operate against those individuals of the English Nation who might be resident in France with peaceful intentions, but that they might withdraw in safety with their goods and effects within three months, saving always to such individuals, as might have become naturalised, the right of remaining in France as French subjects." It would appear from a long series of precedents too numerous to be cited in detail, that the obligation of good faith towards resident foreigners has been acknowledged by the practice of belligerent Powers to operate as a restriction upon their exercise of their *summum jus*, as,

tugal and the States General (6 Aug. 1660) it is provided "that the subjects of either power, if war should break out between them, shall have two years to withdraw their goods." So long an interval is accounted for by the circumstance, that one or both of the contracting parties had colonies or dependencies in the East or West Indies.

belligerents, to seize and detain them as enemies upon the outbreak of war. It is otherwise, however, with foreigners, who are *in transitu*, and happen to be within the territory of a belligerent Power at the time, when war has been commenced against the Sovereign, to whom they owe allegiance. Between such persons and the Government of the country, in which they may happen to be, there is no such implied contract as exists in the case of foreigners, who have been permitted by its laws to establish themselves within its territory on the same footing, for purposes of trade, as its natural born subjects.

Enemy-subjects *in transitu*.

§ 51. The exercise of the *summum jus* of a belligerent in regard to enemy-subjects *in transitu* is not altogether obsolete, although it may be regarded as a matter of Comity between belligerent Powers to refrain from seizing and detaining, as prisoners, any enemy subjects whatsoever, who may happen to be within their respective dominions at the outbreak of war, if they conduct themselves without offence. A remarkable exception to this Comity took place upon the commencement of war between England and France in 1803, when the First Consul issued an ordinance that "all the English from the age of eighteen to sixty, or holding any commission from his Britannic Majesty, who are at present in France, be constituted prisoners of war, to answer for those citizens of the Republic who may have been arrested and made prisoners by the vessels or subjects of his Britannic Majesty previous to any Declaration of War." This ordinance bore date 22 May 1803, and purported to be issued on a Report received on that very day from the Maritime Prefect at Brest, announcing that "two English frigates had taken two French merchant vessels in the Bay of Audierne without any previous Declaration of War, and in

Detention of British subjects in France by the First Consul in 1803.

manifest violation of the Law of Nations. It appears that the British Ambassador, by order of his Government, had demanded his passports and left Paris on the 12th of May, the British Government had issued Letters of Marque and Reprisal on the 16th of May, and his Britannic Majesty had sent a message to Parliament on the 18th of May: on the other hand, the French Ambassador had left Dover on the 18th of May, and the First Consul had sent a message to the Senate on the 20th of May, announcing that the negotiations with Great Britain were broken off, and that France was ready for the combat if she was attacked[26]. It can hardly be disputed, that under these circumstances the capture of the French merchant vessels by the British frigates, which took place on the 20th of May, was an act of War lawfully commenced. It is also clear that the commencement of actual hostilities without any formal Declaration of War on either side was contemplated by the French Government, for the French Minister of Marine had already issued Letters of Marque against Great Britain[27] on the 21st of May, before the French Government received the announcement of the capture of the French vessels by the British frigates. Great Britain had by her own act undoubtedly given rise to a state

[26] Les négotiations sont interrompues, et nous sommes prêts à combattre, si nous sommes attaqués. Message au Sénat 30 Floreal an. xi. (20 May 1803.) —Correspondence de Napoleon, VIII. p. 320.

[27] There is a letter of this date from the First Consul to the Contre-Amiral Decrès, Minister of Marine and of Commerce, requesting him to send twenty-four letters of marque to various French General Officers for distribution. The letters were to be sent in blank, so that no time might be lost in doing all the damage possible to English commerce. Ces lettres seront données en blanc, pour qu'ils puissent être à même de profiter de toutes les occasions, et de ne perdre aucun moment pour faire au commerce Anglais tout le tort possible. Correspondence de Napoleon, VIII. p. 321.

of war between the two Nations on the 20th of May, and the First Consul was entitled to use the Right of a belligerent Power towards British subjects after the capture of the French merchant vessels, but not in the way of extraordinary Reprisals, such as he directed to be executed throughout the Italian Republic[28], as well as throughout France, inasmuch as the act of the British Government involved neither in form nor in substance any departure from the practice, which had been observed in previous wars between Great Britain and France[29]. M. Thiers[30] has represented the First Consul to have originally intended to arrest all the English indiscriminately, but to have given way to the urgent remonstrances of the Minister Cambacérès, and to have so far modified his original purpose, as only to order the arrest of such British subjects as were serving in the Militia[31], or held some commission from the British Government. But this statement of M. Thiers is

[28] Toutes les Marchandises Anglaises qui se trouveront dans la République Italienne seront confisquées au profit de la République, et tous les Anglais qui s'y trouveront, séront arrétés et constitués prisonniers de guerre. (Letter of the First Consul to Citizen Marescalchi, Minister of Foreign Affairs for the Italian Republic, 2 Prairial an. XI. (22 May 1803.) Correspondence de Napoleon, Tom. VIII. p. 322.

[29] Madame la Duchesse d'Abrantes, in her Memoirs of Napoleon, (Tom. VI. p. 405.) narrates the particulars of the interview between the First Consul and her husband, General Junot, when the First Consul ordered General Junot to arrest all the English without any exception. The latter remonstrated with the First Consul, and pointed out to him that there were women and children and old men and merchants amongst them, and that many of them had remained in Paris, trusting to the express assurances of the Minister of Foreign Affairs, that they would be in perfect security.

[30] Histoire du Consulat et de l'Empire, Tom. IV. p. 348.

[31] The Duchesse d'Abrantes represents Napoleon to have yielded to the remonstrances of Cambacérès, so far as to allow the English, who were arrested, to be at large on their parole in the towns, to which they were confined as prisoners ; and when Junot expressed by his looks his surprise at Napoleon declaring that he would use his Right against them, as Prisoners of

not consistent with the language of the Ordinance itself, or with the facts which attended its execution; for the orders, issued under the hand of the First Consul himself, and which are to be found amongst his published correspondence, were to arrest all English subjects without any distinction; and ten thousand British subjects of all classes indiscriminately were seized and detained as prisoners of war, many of whom were even thrown into prison, from which they were not liberated until the allied armies entered France in 1814. The conduct of the French Consul on this occasion must be regarded as altogether exceptional to the modern practice of Nations. Reprisals for the capture of the French vessels was the colourable pretext for his measures, but they were in reality prompted by the exaggerated, if not false, reports of the French police, that the British subjects, who had been allowed to remain in Paris, were plotting against the French Consul[32]. An American jurist, in commenting upon the Ordinance of the First Consul, observes that the Law of Retaliation would hardly seem to require, or even to justify, a resort to means so unusual and odious, although within the extreme limits fixed by the ancient and severer rules of war[33].

§ 52. "Although," writes Klüber, "the Natural Law of Nations does not forbid us to use force against the Subjects of an Enemy-Sovereign, wherever they may be found, yet the usage of war, as established in Europe, restricts the exercise of this Natural Right in regard to those Subjects, who cannot

War, Napoleon exclaimed, Oui, prisonniers de la guerre. Ne font ils pas partie des milices du Royaume? Memoires de Madame la Duchesse d'Abrantes, p. 410.

32 Memoires de Madame la Duchesse d'Abrantes, vol. I. p. 406.

33 Halleck's International Law, p. 362.

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be regarded personally as having taken any part in the offence which has given rise to war, nor as taking any part in hostilities." Accordingly it is very rare that any measures of rigour are employed against them beyond what the necessities of war require in order to prevent them ranging themselves on the enemy's side, and augmenting his active force. In accordance with these principles, the subjects of a sovereign, who has become an enemy, are permitted freely to return to their country after a certain delay, and sometimes they are permitted by a belligerent Power to continue altogether in its territory without molestation[34]. Heffter to the same purport writes, "that Enemy-Subjects, who are found within the territory of a belligerent Power at the commencement of war, ought to be allowed an interval of time to depart. Circumstances nevertheless may render a temporary detention of them necessary, in order to prevent them communicating to their fellow countrymen the plans of the belligerent[35]." Lord Stowell, in commenting upon the modifying influence which the practice of Nations has exercised on the Natural Right of belligerents, observes, "that on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner in which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes, which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and

Modern practice not to detain enemy-subjects.

34 Klüber, § 246, 247. 35 Heffter, § 126. 2.

purposes[36]." It may be said in like manner that the exercise of the Right of a belligerent Power at the commencement of war to seize as prisoners of war all Enemy-Subjects within its territory, although it may have been in ancient times conformable to the practice of Nations, and in restraint of the Natural Right of a belligerent to put his enemies to death, has undergone further restraint, with the increased intercourse of Nations in time of peace; and that such Right may not be exercised in the present day by any belligerent Power without an odious deviation from a milder practice, to which all belligerents are bound in good faith to conform themselves.

§ 53. The exercise of the Right of a belligerent Power to seize and confiscate all enemy's goods found within its territory at the commencement of war, has likewise undergone considerable modification; as it is not the practice to seize and confiscate the goods of an enemy which are on land, nor the debts contracted by the belligerent Power or by its Subjects with the enemy before war broke out. "Between debts contracted under the faith of laws, and property acquired in the course of trade, reason draws no distinction; and although, in practice, vessels with their cargoes found in port at the declaration of war may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade." Such is the language of a most eminent American Jurist, Chief-Justice Marshall[37].

Debts due to enemy-subjects.

§ 54. Mr. Justice Story, on the other hand, seems to impugn the suggestion that the exercise of the right of seizure and confiscation has become modified by usage, although he admits that the exception made

[36] The Fladoyen, 1 Ch. Rob. p. 140.

[37] Brown *v.* the United States, 8 Cranch, p. 123.

by Vattel, namely, that the Sovereign in declaring war can neither detain the persons nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration, because they come into them upon the public faith[38], "is highly reasonable in itself, as confined to the property of persons who are within the country." But even limited as it is, he says, it does not seem followed in practice; and Bynkershoek is an authority the other way[39]. But Mr. Justice Story, in illustrating the exercise of hostile Right, the *summum jus*, in such matters, does not allege any other instances than those in which enemy-vessels and cargoes found afloat in the ports of a belligerent at the commencement of war have been embargoed, and ultimately confiscated as prize of war. "Of the Right of a State to seize vessels and cargoes found in her ports on the breaking out of war, I do not find," he says, "any denial in authorities which are entitled to much weight; and I therefore consider the rule of the Law of Nations to be, that every such exercise of authority is lawful, and rests on the sound discretion of the Sovereign." It will be seen then that Mr. Justice Story maintains in practice nothing beyond the limited exercise of hostile Right in regard to enemy's property, which may be afloat in the ports of a belligerent Nation at the commencement of war, and in the exercise of which Right, as perfectly lawful under the Admiralty jurisdiction, all jurists concur. But when Mr. Justice Story goes further, and holds that a belligerent Power may lawfully authorise the confiscation of enemy's property, whenever by the rigour of the Law of Nations it may be rightfully seized; and that however odious it may be deemed in modern times, a belligerent Power has the Right

Opinion of Mr. Justice Story.

[38] Vattel, Droit des Gens. L. III. c. 4. § 63.

[39] Bynkershoek, Quæst. Jur. Pub. L. I. c. 2, 3, 7.

to confiscate all debts due from its own subjects to enemy-subjects, it becomes necessary to distinguish between the existence of a Right, which by the rigour of the Law of Nations is inherent in the Sovereign Power of every independent State, and the exercise of that Right as it is controlled by the usage of Nations. There may be a warrant of Natural Right for the Executive Government of every belligerent State to confiscate enemy's property, in whatever form it may be, if it is found in a place which is subject to its Sovereignty; and yet there may be a restraint imposed by the usage of Nations upon a belligerent State exercising its extreme Right of Sovereignty in certain cases, which restraint it cannot disregard consistently with good faith.

The rules of law, which Courts are bound to administer, are not always identical with the rules of conduct, which Nations are bound to observe in their intercourse with one another. The functions of the judiciary body in every State are defined by the Sovereign Power of the State, in regard to the law which they are called upon to administer: so likewise the judicial tribunals may be limited and controlled in their field of view by the executive authority, or by the territorial legislature; and it is not within the province of the judiciary body to criticise or call in question the good faith of the State, if it has authorised it to administer the *summum jus* of belligerents. But as between Nations Good Faith must be upheld at the sacrifice of absolute Right; and if it should be inconsistent with International Good Faith for a State to exercise the *summum jus* of a belligerent in certain matters, it would be against the modern Law of Nations for a State to authorise its Courts to administer the *summum jus* of a belligerent in such matters. Mr. Justice Story seems to consider, that foreign Nations with whom there is not a treaty to

the contrary, could only complain of such an act as a violation of the modern policy; but this matter seems to rest upon more solid foundations than those of mere policy. Mr. Justice Story holds, and in this respect he has the concurrence of all jurists, that if a Nation has stipulated in a treaty of commerce with another Nation that, if war should break out between them, they will mutually refrain from exercising their extreme Rights as belligerents in certain matters, either Nation would have just ground of complaint, if the other should not conform its conduct to the treaty stipulations; but in maintaining this position Mr. Justice Story concedes the whole question, and upholds the obligation of Good Faith at the sacrifice of Absolute Right; for war terminates, or at least suspends, the obligations of commercial treaties, as such, and no obligation remains after the breaking out of war, but that of Good Faith, to bar the exercise of all the Rights on the part of Nations which a State of War gives rise to. Treaty stipulations in such matters only serve to give greater precision to the obligations of Good Faith; but they are not necessary to create those obligations, which may arise, and will be equally binding without any written specification of them[40]. A specific contract in fact differs only from an implied contract in the mode of proof[41].

§ 55. The Right of a belligerent Power to confiscate debts contracted by itself or by its Subjects in time of peace with individuals, who by the breaking out of war have become clothed with an enemy-character,

[40] The case of Brown *v.* the United States, 8 Cranch, p. 121, was an appeal to the Supreme Court of the United States, from a judgment of Mr. Justice Story in the Circuit Court of Massachusetts. The Emulous, 1 Gallison, p. 136.

[41] Chief-Justice Erle, in Kennedy *v.* Broun, Queen's Bench, Jan. 16, 1863.

rests very much upon the same principles as the right of confiscating the property of enemy-subjects, found in the country of a belligerent at the commencement of war. Mr. Chancellor Kent however considers that the objection to the right of confiscation in the case of debts is much stronger than the objection to the right of confiscating the tangible property of an enemy. It may be conceded that if the extreme right of a belligerent is to be exercised against an enemy, the latter is in strict right absolutely at the mercy of his adversary; and no limits can be set to the exercise of the *summum jus*, than those which compassion for the vanquished may suggest. But war is not carried on in this spirit between Christian Nations. It has been the constant effort of the wise and the good amongst statesmen whose more especial province it has been to regulate the intercourse of Commonwealths, to mitigate the exercise of hostile Right between Nations; and wheresoever the practice of Nations has, under their influence, restrained the exercise of the *summum jus*, individual Nations cannot revive its exercise without a violation of good faith. Vattel, who considers that the *summum jus* of a belligerent warrants the confiscation of debts due to his adversary, says, "At present, a regard to the advantages and safety of commerce, has induced all the Sovereigns of Europe to act with less rigour in the subject of confiscating debts due from their subjects to an enemy. And as the custom has been generally received, the Sovereign who should act contrary to it would violate public faith; for strangers have trusted his subjects only from a firm persuasion that the general custom would be observed[42]. Bynkershoek is the only jurist of eminence who holds it to be a matter of Common Right for a belligerent

Chancellor Kent.

Vattel.

Bynkershoek.

[42] Droit des Gens, Lib. III. c. 5. § 77.

Sovereign to confiscate upon the outbreak of war the debts due from himself or his Subjects to the Enemy. There are however passages in Grotius and Puffendorf which are frequently cited as being in accordance with Bynkershoek's views, but these passages, if carefully examined, will be found to bear upon another subject—namely, the right of a belligerent, who is in possession of an enemy's country by Right of Conquest, to appropriate to himself the debts due from neutral Nations to the Enemy whom he has conquered, as well as the tangible property of the Enemy. The instance which is given by both those writers is that of Alexander the Great, who by conquest had become master of the City and State of Thebes, and thereupon remitted to the Thessalians a debt due from them to the Thebans. In this case the conqueror in the war considered himself to have succeeded, by Right of Conquest, to the title of the conquered State to exact or remit the debt due to it from the Thessalians. Now Grotius holds this transaction to have been well founded in Right, on the ground of the absolute conquest and subjection of the City and State of Thebes: "Nam qui dominus est personarum, idem et rerum est, et juris omnis quod personæ competit[43]." But it is one thing to claim dominion over incorporeal Rights which are annexed to corporeal things, such as cities or countries, by reason of such corporeal things being reduced into our possession by conquest, and another thing to claim dominion over incorporeal Rights belonging to persons, more especially when such persons have not been made captive.

§ 56. It is a well understood position of Law, that if a subject of any commonwealth be taken by an enemy,

43 L. III. c. 4. § 2. Qui possidetur, non possidet sibi, nec in potestate habet, qui non est suæ potestatis.

his goods, which were not taken with him, are not acquired by the conqueror, but fall to him who would have been his heir at law, if he had died a natural death[44]. "How then," asks Lord Ellenborough, "can things belonging to a person who has not been made captive, be legally acquired by an enemy, who is not a conqueror either as to the person or the thing?"

Judgment of Lord Ellenborough, in Wolff *v.* Oxholm.

Lord Ellenborough, on the occasion of making the above observation, was delivering the judgment of the Court of Queen's Bench[45] (anno 1817,) in a suit brought by a British subject against a Danish subject for a debt, which the latter alleged to have been confiscated by the Danish Government under an Ordinance issued by it at the commencement of war with Great Britain in 1807. On this occasion Lord Ellenborough said that the Court had been unable to discover that there ever was a time when it was the general practice of Nations to confiscate debts; that although Bynkershoek had cited some instances of such confiscations in the sixteenth and seventeenth centuries, and there was a solitary decision about the middle of the sixteenth century by a Court in Paris, against a Fleming, who was suing a Frenchman to recover from him a debt which he had paid into the French Treasury in obedience to a French decree during war between the two Nations; yet there was not a single instance of such a confiscation to be found for something more than a century, whilst the right was not recognised by Grotius, and was impugned by Puffendorf and others. The Court accordingly held that as the Danish Ordinance was not conformable to the usage of Nations, they were not bound to pay regard to it. Lord Alvanley, in the case of Furtado *v.* Rogers, 3 Bosanquet and Puller, p. 191, said,

44 Puffendorf, L. VIII. c. 6. § 22.

45 Wolff *v.* Oxholm. 6 Maule and Selwyn, p. 92.

"With respect to the argument, that all contracts made with the enemy accrue to the benefit of the King during war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted, nor is it probable that it ever will be adopted, as well from the difficulties attending it, as from the disinclination to put in force the Prerogative." It is worthy of remark that even Bynkershoek [46] admits that there were doubts in his time whether the incorporeal rights of an enemy could be confiscated by a belligerent; and he cites an instance of the States General (6 July 1673,) refusing to pay regard to an Ordinance of the French King, confiscating certain debts due from French subjects to subjects of the States General. Mr. Justice Story is therefore not strictly warranted in affirming that down to the year 1737 [47] it may be considered as the opinion of jurists that the right of a belligerent to confiscate debts due to his enemy at the commencement of war was unquestionable. This eminent jurist does not in either of his elaborate judgments [48] take any notice of the decision of the Court of King's Bench at Westminster, in Wolff *v.* Oxholm. Mr. Chancellor Kent, on the other hand, refers to that judgment in a note, and admits that the weight of modern authority and of argument is against the claim of Right on the part of a belligerent Sovereign to confiscate the debts and funds of the Subjects

[46] De incorporalibus tamen, ut sunt actiones et credita, dubitari videtur, et dubitasse, quin et aliquando contradixisse nostros ordines. Quæst. Jur. Publici, L. I. c. 7.

[47] Mr. Justice Story adopts the year 1737 as being the date of the publication of Bynkershoek's Quæstiones Juris Publici; but Mr. Wheaton aptly remarks that Bynkershoek adduces no precedent later than the year 1667, seventy years before the publication of his work.

[48] The Emulous, 1 Gallison, p. 563. Brown *v.* the United States, 8 Cranch, p. 121.

of the Enemy during war. "This right," he goes on to say, "was admitted by the American Courts, to exist as a settled and decided Right *stricto jure*, though at the same time it was considered to be the universal practice, to forbear to seize and confiscate debts and credits; we may therefore lay it down, he says, as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in the United States, that it rests on the discretion of the legislative of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy; but, as it is asserted by the same authority, this Right is contrary to universal practice, and it may therefore well be considered as a naked and impolitic Right, condemned by the enlightened conscience and judgment of modern times[49]." Mr. Wheaton[50] questions the soundness of the judgment of the Courts of Queen's Bench in Wolff *v.* Oxholm; but he admits that the Right only exists theoretically, and is seldom or never practically exerted. Emérigon, Klüber, Chitty, Manning, and Phillimore, concur in holding that the modern Law of Nations repudiates the confiscation of debts due to an enemy at the outbreak of war; and it is beyond controversy, that if a Sovereign Power should, in the present day, exercise the extreme Right of a belligerent in confiscating debts due from its Subjects to Enemy-Subjects, other Nations would be justified by the modern usage in refusing to recognise such an avoidance of the contract in regard to their own Subjects.

Wheaton.

§ 57. War, however, whilst it does not avoid a contract which was originally valid, suspends the remedy for the non-observance of it, until peace has been restored. It is the doctrine of all the writers

[49] Commentaries, Tom. I. p 65.

[50] Elements, Pt. IV. c. 1. § 12.

of authority on the Law of Nations, and a rule of the maritime ordinances of all the great Powers of Europe, that War puts an end to all commerce between the subjects of adverse belligerent Powers; and this doctrine is in conformity with the universal and immemorial usage of civilised Nations. All contracts accordingly made with the enemy during war are legally void; that is, Courts of Law will not give effect to them. But the same necessity which precludes a belligerent from allowing his subjects to enter into contracts with the enemy during war, authorises him to forbid his subjects to fulfil their contracts made before war, until the necessity of weakening the enemy, by cutting off his supplies, shall have passed away upon the cessation of war. It is a principle of law, says Lord Stowell[51], that during a State of War there is a total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the inhabitants of the other. In the law of almost every country, the character of an alien enemy carries with it a disability to sue or to sustain in the language of civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great vigour. The same principle is received in our Courts of the Law of Nations: they are so far British Courts, that no man can sue therein, who is a subject of the enemy, unless under particular circumstances, that *pro hâc vice* discharge him of the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *exlex*. But the right of an alien to enforce a contract which is suspended whilst he is an alien enemy, will revive as soon as

Suspension of commercial contracts.

[51] The Hoop, 1 Robinson, p. 201.

he is again clothed with the character of an alien friend. Such is the doctrine maintained by the English Courts both of Law and of Equity. The Lord Chancellor Eldon[52], in admitting a debt to be proved on behalf of an alien enemy against the bankrupt estate of an English merchant, said, "If this had been a debt arising from a contract entered into with an alien enemy during war, it could not possibly stand, for the contract would be void: but if the two Nations were at peace at the date of the contract, though from the time of war taking place the creditor could not sue, yet the contract being originally good, upon the return of peace the right would revive. It would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be "divided amongst the creditors." Such also, says Mr. Wheaton,[53] is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery, on the restoration of peace between the two countries.

Debts due by an enemy-sovereign.

§ 58. The Right of confiscating the public debts of a State, if war breaks out between that State and the country of which the creditors of the State are subjects, deserves a separate consideration. The question arose for the first time, as a great question of Public Law, upon the occasion of the King of Prussia, by way of retorsion for the capture of Prussian vessels by British cruisers, attaching certain capital funds which his Majesty had undertaken to reimburse to the subjects of Great Bri-

[52] Ex parte Boussmaker. 13 Vesey Junior, p. 71

[53] Elements, Part IV. c. 1. § 12.

tain in virtue of the Treaties of Breslau (11 June 1742[54]) and of Dresden (25 Dec. 1745[55]), with the view of indemnifying his own subjects out of those funds. Under those treaties the King of Prussia had engaged himself to the Empress Maria Theresa to pay off more than a million of money, which had been lent by British subjects to the Emperor Charles VI. upon the mortgage of the Duchies of Silesia, which were ceded by those treaties to Prussia, and of which the possession was guaranteed to Prussia by Great Britain under the Treaty of Dresden. The consideration for Prussia undertaking to discharge the debt contracted by the Emperor, was the cession of the Duchies of Silesia; and Prussia was in possession of those Duchies at the time when the King of Prussia proposed to confiscate all the debt due to British subjects. But the King of Prussia had undertaken to pay the money *selon le contrat*, and the English jurists contended in the memorable reply[56] presented by the Duke of Newcastle, in answer to Mr. Michell's memorial on behalf of his Prussian Majesty, that the late Emperor could not have seized the money as reprisals, or even in case of open war between the two Nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever. "It will not be easy to find," they say, "an instance where a person has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will

Conduct of Prussia in regard to the Silesian Loan.

54 Wenck, Codex Jur. Gent. I. p. 739.

55 Ibid. II. p. 195.

56 This reply, which was drawn up by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, his Majesty's Advocate General, Sir Dudley Ryder, Attorney General, and Mr. Murray, Solicitor General, has been pronounced by Vattel (L. II. c. 7. § 84. N. ed. 1758) to be un excellent morceau de droit des Gens, and by Montesquieu (Lettres Persanes, L. XIV.) une réponse sans réplique. It will be found in the Collectanea Juridica, vol. I. p. 129.

not be done: a private man lends money to a Prince upon the faith of an engagement of honour, because a Prince cannot be compelled, like other men, in an adverse way by a Court of Justice. So scrupulously did England, France, and Spain, adhere to this public faith, that even during the war they suffered no inquiry to be made, whether any part of the public debts was due to the subjects of the enemy, though it is certain many English had money in the French Funds, and many French had money in ours." Vattel, writing almost immediately after the publication of the British Reply, says, "The State does not so much as touch the sums which it owes to the Enemy: money lent to the Public is everywhere exempt from confiscation and seizure in time of war." It is obvious that it would be contrary to natural justice for a State to reap the benefit of a loan, of which it retains possession, and at the same time to refuse to pay the equivalent for that benefit, which it pledged its faith to pay when it accepted the benefit. It is not like the case in which a State has undertaken to grant a favour to the subject of a friendly Power, the continued enjoyment of which may be reasonably taken to be conditional on the continuance of friendship between the two States.

Conduct of Great Britain in regard to the Russian-Dutch Loan.

The payment of a moiety of the Russian-Dutch Loan is an instance of an obligation undertaken by Great Britain for a permanent equivalent, in consideration of Holland agreeing that Great Britain should retain certain Dutch colonies and dependencies, of which Great Britain was in possession at the conclusion of the war in 1814. Great Britain took upon herself the obligation of a moiety of a certain loan made by Hol-

57 L. III. ch. 5. § 77. L'État ne touche par même aux sommes qu'il doit aux Ennemis; partout les fonds confiés au public sont exempts de confiscation et de saisie en cas de Guerre.

land to Russia during the war. It was recited in the fifth Article of the Convention of London[58], (19 May 1815), that "it was understood and agreed between the high contracting parties, (Great Britain, the Netherlands, and Russia,) that the payments on the part of the King of the Netherlands and the King of Great Britain should cease and determine, (such payments being payments of an annual interest of five per cent, together with a sinking fund of one per cent,) if the possession and sovereignty of the Belgic Provinces should at any time pass or be severed from the dominions of the King of the Netherlands at any time before the complete liquidation of the same: and that it was also understood and agreed between the high contracting parties, that the payments on the part of their Majesties the King of the Netherlands and the King of Great Britain, as aforesaid, should not be interrupted in the event of a war breaking out between any of the three high contracting parties; the Government of his Majesty the Emperor of All the Russias being actually bound to his creditors by a similar agreement." Upon the separation of the Belgic Provinces from the Kingdom of Holland in 1831, Great Britain entered into a new Convention with Russia, conceiving that though the event had happened, which, according to the *letter* of the Convention of 1815, released Great Britain as well as Holland from the obligation of continuing to pay off her portion of the loan, Great Britain was still bound, according to the *spirit* of that Convention, which was made on her part in consideration of the general arrangements of the Congress of Vienna, to adhere to her engagements. A new Convention between Russia and

[58] Martens, N. R. II. p. 290.

Great Britain was accordingly executed, (London, 16 Nov. 1831[59],) whereby the King of Great Britain undertook to recommend to the British Parliament to enable him to continue the payments stipulated in the Convention of the 19th of May, 1815, conformably to the manner, and until the liquidation of the sum therein specified. Notwithstanding that open war arose between Great Britain and Russia in 1854, Great Britain never faltered in her good faith in the matter of the understanding between herself and the other two Powers, as set out in the fifth Article of the Convention; and the interest and instalments of the loan have been regularly voted without the slightest interruption by the British Parliament, and paid by the British Government to the agents of the Russian Government. Further, when a motion was made by Lord Dudley Stuart in the House of Commons in the month of August 1854, during the war with Russia, that Great Britain should renounce her obligation to make any further payments of the loan, upon the ground that Russia had violated the general arrangements of the Congress of Vienna, the motion was rejected on this, amongst other grounds, that "Great Britain being at war with Russia, was bound, by a regard to National Honour, to be more than ever jealous of affording the slightest ground for the accusation, that she wished to repudiate debts justly contracted with the Power which was for the time her Enemy."

Embargo of enemy-property afloat within the ports of a belligerent.

§ 59. The practice of seizing and confiscating the vessels and cargoes of Enemy-Subjects which may be within the ports of a belligerent at the commencement of war, is a tradition of the Admiralty jurisdiction exercised in common by Nations over all ves-

[59] Martens, N. R. IX. p. 542. Hertslet, IV. p. 367.

sels and their cargoes which may be in creeks, or havens accessible to tidal waters. Mr. Justice Story, in discussing the right of confiscating enemy-property, distinguishes between property which may be water-borne, and property which is on the land, and inclines to hold that, whilst the former may be proceeded against as prize under the Admiralty jurisdiction, the latter, if liable to seizure and condemnation at all in the Courts of the belligerent Power, would have to be proceeded against in the manner applicable to Municipal confiscations[60].

It would seem that the Admiralty, which is an Institution of the Law of Nations, exercises an original jurisdiction, exclusively of every other Judicature in matters of prize; and that the Admiralty has from time immemorial exercised its prize jurisdiction over vessels and their cargoes which are afloat in ports and harbours, equally as over those which may be on the High Seas; and that Municipal Courts, as such, cannot enquire into a question of prize or no prize, which has been decided by the Admiralty[61]. By the Law of Nations property, which is afloat on tidal waters within a port or harbour, is not subject to the Municipal Law of a State in the same exclusive manner, as property which is upon the land. Being therefore not subject to the exclusive control of the Sovereign of the territory, it is not within his protection in the same absolute manner as property on the land; and Nations have not been accustomed to regard it as an act of bad faith, if a belligerent Sovereign at the commencement of war should have seized all enemy-vessels which were afloat within his ports. This distinction between the *concurrent* jurisdiction,

60 Brown *v.* the United States, 8 Cranch, 139.

61 Le Caux *v.* Eden. Douglas, p. 614.

which all Nations exercise over vessels and cargoes which are afloat within the flux and reflux of the tide, and the *exclusive* jurisdiction which each individual Nation exercises over all persons and things which have been landed on its soil, may serve to explain in some respects the difference in the treatment, which enemy-property afloat has in practice undergone at the commencement of war, as contrasted with enemy-property which has been landed and remains on land. The circumstance that the cognisance of all seizures of vessels and their cargoes when afloat, as prize of war, belongs to the Admiralty jurisdiction, is evidence of the high antiquity of the practice of such seizures. The maintenance of this practice is becoming more open to question, as being scarcely reconcilable with that good faith upon which the enlarged commercial intercourse of Nations proceeds.

Conduct of the Allied Powers at the commencement of the war against Russia in 1854.

§ 60. We find, accordingly, that the Queen of Great Britain, upon the breaking out of war with Russia in 1854, in ordering an Embargo to be laid upon all Russian vessels that should thereafter enter any British port, harbour, or roadstead, being desirous to lessen as much as possible the evils of war, directed by an Order of the same date[62], "that Russian merchant vessels, in any ports or places within her Majesty's dominions, should be allowed six weeks for loading their cargoes and departing from such ports and places; and further, should not be molested, if met at sea by any British cruiser." Great Britain went even further in moderating the exercise of belligerent Right, by directing that "any Russian vessel which should have sailed from a foreign port, prior to the date of her Majesty's Order, bound to any

62 Orders in Council of 29 March 1854, published in the second supplement to the London Gazette of 29 March 1854.

port or place of her Majesty's dominions, should be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by a British cruiser, should be permitted to continue her voyage to any port not blockaded." The conduct of the Emperor of the French was distinguished by the same mildness towards Russian merchants trading in the French dominions; and the Emperor of All the Russias reciprocated the treatment, which Russian subjects had experienced in the British and French ports, by proclaiming a similar indulgence to British and French merchants trading in the ports of the Russian Empire. The conduct of the belligerent Powers on this occasion marks an epoch in the practice of Nations in regard to the exercise of belligerent Right at the immediate outbreak of war. There are not found in the Treaties of Commerce[63], which existed between Russia on the one hand and France and Great Britain respectively on the other hand, any stipulations which provide that enemy-merchants shall be treated with forbearance on the outbreak of war. It has been therefore upon the promptings of *good faith*, that Great Britain and France have set the example on this occasion of renouncing the exercise of belligerent Right in seizing and confiscating the vessels and cargoes of Enemy-Subjects, which were in their ports at the commencement of war. It must be observed, however, that the war on this occasion, which Great Britain and France held themselves compelled to declare against the Emperor of All the Russias, was

Russian Reciprocity.

[63] Treaty of Commerce between Russia and Great Britain (11 January 1843). Martens, N. R. Gén. V. p. 8. Treaty of Commerce between Russia and France (16 September 1846). Martens, N. R. Gén. IX. p. 335.

a war, not for the redress of injuries received by the Subjects of either of those Powers, but for the protection of the dominions of their Ally, the Sultan of the Ottoman Empire, against the encroachments and unprovoked aggression of the Emperor of All the Russias. It was not a war, therefore, in which Reprisals against the property of Russian Subjects would have been permissible by the practice of Nations, before war had been commenced. The precedent therefore does not apply to cases in which there has been a denial of redress for injuries received, and in which, by the practice of Nations, the Subjects of the State that has inflicted injury upon the Subjects of another State, are liable to have their ships and cargoes seized and confiscated for the indemnification of the injured parties, before war is declared.

Immovable property of enemy-subjects within the territory of a belligerent.

§ 61. With regard to immovable property, such as land and houses, Bynkershoek[64], who is the most strenuous advocate of belligerent Right, whilst stating that a belligerent Power, on general principles, is entitled to confiscate any real property which an Enemy-Subject may possess within its territory, admits that the practice throughout Europe has been to sequestrate the profits only during the war, and to reinstate the owner in his property on the return of peace. Vattel[65] to the same effect says, that "he who declares war does not confiscate the immovable property possessed in his country by his Enemy's Subjects. By permitting them to purchase and possess such property, he has in this respect admitted them into the number of his own Subjects. But the income may be sequestrated, in order to prevent its being remitted to the enemy's country."

64 Bynkershoek, Quæst. Jur. Publ. L. I. c. 7.

65 Droit des Gens, L. III. c. 5. § 76.

CHAPTER IV.

RIGHTS OF A BELLIGERENT WITHIN THE TERRITORY OF AN ENEMY.

General Right of a Belligerent against Enemy's property—Regulated exercise of that Right—Right within Enemy's territory—All movable property within it booty of war—Military contributions in lieu of booty—Destruction of military stores and provisions—Devastation of crops—Immovable property of enemy-subjects—National Domain of an Enemy—State Papers and Public Archives—Public Libraries and Museums—Restitution of the works of Art collected in the Gallery of the Louvre in 1815—Opinion of the Duke of Wellington—Wheaton's view—Decision of a British Prize Court—Destruction of the Capitol at Washington in 1814, on the ground of retaliation—Property water-borne in an enemy's port—Distinction between booty of war and prize of war—Court of Chivalry—Jurisdiction of High Court of Admiralty extended in certain cases over booty of war.

General Right of a Belligerent against enemy's property

§ 62. WAR being a contention by force, with the object either of redressing injury which has been inflicted, or of preventing injury which is threatened, every Nation which carries on a just war has a right to take possession of the property of its Enemy, either by way of satisfaction for past injury, or by way of security against future injury. "By Natural Law," says Grotius[1], "we acquire in a just war such things as are equivalent to that which is due to us, and which we cannot obtain in any other

[1] L. III. c. 6. § 1.

manner, or such things as inflict on the offending party a loss which is within the fair limit of punishment." "A State," says Vattel[2], "taking up arms in a just cause, has a double right against the Enemy. 1. It has a right to obtain possession of the property withheld by the Enemy, to which must be added the expenses incurred in the pursuit of that object, the charges of the war, and the reparation of the damages; for if it were obliged to bear those expenses, it would not fully recover its property or obtain its due. 2. It has a right to weaken its Enemy, in order to render him unable to maintain his unjust violence; a right to deprive him of the means of resistance. Hence, as from this source, originate all the rights which war gives us over the property of an enemy. On certain occasions this right of punishing an enemy produces new rights over the things which belong to him, as it does over his person."

Regulated exercise of that right.

§ 63. It is lawful, therefore, for a belligerent Power to appropriate to itself the property of its adversary to such an extent as may be requisite to provide for itself reasonable satisfaction for past injuries, and reasonable security against future injury. The Right to Security will further authorise a belligerent to inflict upon an enemy a loss, with the object of chastising him for his injustice or violence and at the same time furnishing an example to deter others from similar acts of injustice or violence. With this view an enemy may be lawfully deprived of his possessions, or of anything which is calculated to give him strength and ability to make war. But it is not every war that affords just ground for inflicting punishment on an enemy. In cases which admit of doubt, each party is candid and sincere

[2] Droit des Gens, L. III. c. 9. § 160.

in his contention. The arms of each party are to be accounted equally lawful whilst the contest is undecided; and after the cause has been decided by the event of the war against one of the parties, if the vanquished party has observed moderation in the prosecution of his asserted Right, he is entitled rather to compassion than to resentment at the hands of the conqueror. The only circumstance, therefore, which justifies a belligerent in punishing a vanquished enemy is, either the evident injustice of the latter in taking up arms, or his departure from the received practice of Nations in the conduct of the war. Regular war, as to its effects, is to be accounted just on both sides; and the Rights founded on a state of war do not externally and between mankind depend upon the justice of the cause, but upon the legality of the means in themselves[3]. If a belligerent accordingly observes all the rules of regular war, his adversary is not entitled to complain of him as a violator of the Law of Nations in his conduct of the war. Either belligerent has equal pretensions to justice; and neither party has any other resource, when an appeal has been made to arms, than victory or an accommodation. In every case, however, if an enemy has no plausible pretext for taking up arms, or if he conducts his resistance in any manner which should offend against the practice of Nations, he makes himself liable to punishment; but even then the victorious party ought not to inflict upon him a punishment beyond that which his own security or the general safety requires. Cicero[4] condemns the conduct of his countrymen in destroying Corinth to avenge the indignities shown to the Roman Envoys, inasmuch as Rome was able to assert the dignity of her Ambassadors, without

3 Vattel, L. III. c. 12. § 190. 4 Cic. de Officiis, L. I. c. 11.

having recourse to a measure of such extreme rigour[5].

Right within enemy's territory.

§ 64. As the object of war is to bring about a just peace, a belligerent Nation is justified in invading the territory of the Enemy, and in seizing its goods, its towns, and its provinces, in order to bring it to reasonable conditions, and to compel it to acquiesce in an equitable and firm peace[6]. With this view a belligerent Nation may take possession of the property of the Enemy to an extent far beyond what would be a just indemnification for any injury which it may have suffered, with the design of restoring the surplus by a treaty of peace.

A belligerent Nation, in taking possession of the property of the Enemy, acquires possession of the Rights which are incident to that property: for instance, if a belligerent Nation takes possession of an Enemy's territory, it takes possession not merely of the soil and the movable property upon it, but of the Sovereignty over it, and may exercise the latter during such time as it remains in possession of the territory.

Movable property booty of war.

With regard to the property which is found upon the Enemy's territory, all movable property which belongs to Enemy-Subjects is booty (butin) of war, and passes with the territory into the possession of the belligerent; for the actual owners of the property are not distinguishable, as individuals, from the body of the Enemy-Nation, and the actual captors are the trustees of a belligerent Nation in making capture. The rule which governs all captures is expressed by the maxim, *Parta bello cedunt reipublicæ*[7]. "As the towns and land taken from the Enemy," writes

5 Grotius, L. III. c. 12. § ii. 3.

6 Vattel, L. III. c. 9. § 163.

7 The Elsebe. 5 Ch. Robinson, p. 181.

Vattel[8], "are called conquests, all movable property taken from the Enemy comes under the denomination of booty. This booty naturally belongs to the Sovereign making war equally as the conquests, for he alone has such claims against the hostile Nation, as warrant him in seizing the property and converting it to his own use. His soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right." All the movable property, accordingly, of a vanquished enemy, is of *strict right* at the mercy of the conqueror; but this strict right is in practice only enforced on the part of the conqueror, where the Right of Resistance has been maintained to the uttermost by the vanquished party, as for instance where a town has been besieged, and has been formally summoned to surrender on terms, and has refused to surrender, and has been subsequently taken by assault. In such a case the conqueror is justified by the extreme resistance of the adversary in exercising his extreme Right of Conquest, and in seizing, as booty of war, all the movable property of the enemy. It is customary indeed for the Sovereign, or the authority which represents the Sovereign Power of the Nation, to grant to its army a share of the booty taken on such occasions. The mode, however, in which such booty is to be shared amongst its army depends upon the pleasure of the Sovereign Power[9]. In some cases it is customary to give up the whole of the booty to the troops which have taken it; as for instance, where it is the immediate result of a pitched battle, or where a fortified camp or town has been taken by storm: in such cases the actual captors are allowed to gather freely the spoils of their victory.

[8] L. III. c. 9. § 165. Klüber, § 253.

[9] Grotius, L. III. c. 6. § 13. Vattel, III. c. 9. § 164.

On the other hand, where the booty is the ultimate result of a general campaign, it is usual for the Sovereign Power to distribute it amongst all the divisions of the army, engaged in the combined operations of the campaign[10].

Military contributions in lieu of booty.

In cases, however, where the Enemy has surrendered upon terms, it is now the practice among Christian Nations for the Sovereign Power not to seize and confiscate, as booty of war, the private property of individual citizens, but either to content itself with making prize of all the public property of the Enemy-Nation, which is of a movable character, such as jewels, or treasure, or instruments of war, or military stores; or in case it should assert its Right of Conquest over the private property of enemy-citizens, to limit itself to levying upon them a Contribution of money or provisions, in consideration for which their actual property is guaranteed from pillage. But the commander of a victorious army must, under such circumstances, be moderate in his demand of Contributions, if he wishes to escape the reproach of inhumanity and greediness[11].

§ 65. The exercise of the Natural Right of a belligerent to ravage the Enemy's territory, with the exception of those cases in which the conduct of the Enemy has merited special chastisement, is governed by the maxim that nothing is allowable against an enemy but what is necessary, and nothing is necessary which does not tend to procure victory and bring the war to a conclusion. All damage therefore which is done to an enemy without any corresponding advantage accruing to the belligerent is an abuse of the Natural Right of the latter. Thus indeed a belligerent is entitled to capture all the property of an enemy

[10] The Army of the Deccan. 2 Knapp's Reports, p. 114.

[11] Vattel, L. III. c. 9. § 165.

which is calculated to enable him the better to carry on hostilities, and if he cannot carry it away conveniently, to destroy it. A belligerent, for example, may destroy all existing stores of provisions and forage, which he cannot conveniently carry away, and may even destroy the standing crops in order to deprive his enemy of immediate subsistence, and so reduce him to surrender. But a belligerent will not be justified in cutting down the olive trees, and rooting up the vines; for that is to inflict desolation upon a country for many years to come, and the belligerent cannot derive any corresponding advantage therefrom[12]. When the French armies desolated with fire and sword the Palatinate in 1674, and again in 1689, there was a general outcry throughout Europe against such a mode of carrying on war; and when the French Minister Louvois alleged that the object in view was to cover the French frontier against the invasion of the Enemy, the advantage which France derived from the act was universally held to be inadequate to the suffering inflicted, and the act itself to be therefore unjustifiable. A belligerent Prince who should, in the present day, without necessity, ravage an Enemy's country with fire and sword, and render it unhabitable, in order to make it serve as a barrier against the advance of the Enemy, would justly be regarded as a modern Attila. The necessity of war has occasionally justified Princes in laying waste their own provinces in order to raise a barrier against an enemy, whom they could not otherwise hope to check. For instance, Peter the Great laid waste an extent of eighty leagues of his own Empire with a view to check the advance of the troops of Charles XII. of Sweden. The Swedes were accordingly worn down with want and fatigue in their advance, and the victory of

Destruction of military stores and provisions.

Devastation of crops.

[12] Vattel, L. III. c. 9. § 166.

Pultowa was claimed by the Czar, as the result of the sacrifice. There may be cases, therefore, when necessity will justify similar extremities in an Enemy's country; but such instances will be of rare occurrence, and may be regarded as exceptional.

Immovable property of enemy subjects.

§ 66. With regard to the immovable property of enemy-subjects, there was a time when the lands of enemy-subjects were confiscated by the victor, just as the rights of the victor over the person of a prisoner of war was absolute and unlimited[13]. But the right of a victor to use his prisoners of war as slaves has ceased to be exercised since the middle of the seventeenth century[14]; and it may be said to have become the universal practice of Christian Powers, since the Treaty of Munster, (30 Jan. 1648,)[15] to release all prisoners at the end of a war without ransom[16]. So likewise the landed and immovable property of private individuals is in general by the positive law of Nations not liable to confiscation by a victorious Enemy[17]. A victorious Nation on the other hand enters upon the public rights of the vanquished Nation, and the National domain and the National treasure pass to the victor[18]. He may dispose of the National domain at the risk of the purchaser, in case the vanquished Nation should recover possession of its dominions; for it is only by a treaty of peace, or by the entire

[13] Vattel, L. III. c. 7. § 1.

[14] At the commencement of the seventeenth century we find many treaties of peace, in which it was stipulated that prisoners of war should not be sent to the galleys.

[15] Dumont Traités, Tom. VI. Pt. I. p. 434.

[16] There was a special provision in the Treaty of Amiens (1802) concluded between Great Britain on the one hand, and the French and Batavian Republics on the other, that the prisoners on both sides should be released without ransom. This provision may have been rendered necessary by the previous conclusion of a cartel for the ransom of prisoners at fixed money prices.

[17] Manning. c. 8. p. 162.

[18] Vattel, L. III. c. 12. § 200. Martens, Précis, § 280. Klüber, § 256. Wheaton, Pt. IV. c. 11. § 5.

submission of and extinction of the vanquished Nation, that the acquisition of its public domain by the victor is consummated, and his proprietary right made perfect. A neutral Power cannot lawfully step in and purchase a conquered country, while the war continues; for it is inconsistent with neutrality for him to furnish a victorious belligerent with money to enable him to prolong the war; and if he should take possession of his purchase and maintain it against its original owner, he would be aiding his adversary. Thus the King of Prussia became a party with the enemies of Sweden by accepting Stettin from the hands of the King of Poland and the Czar of Russia[18], under the Convention of Schwedt (6 October 1713,) after they had captured it from the Swedes, and by consenting to hold it as sequestrator, until peace should be concluded. The conduct of the King of Prussia, which was inconsistent with a just neutrality, involved him, not long after he had so taken possession of Stettin, in hostilities with Sweden. But when a conquered Nation has by a definitive treaty of peace ceded a country to the conqueror, the former has relinquished all right to it, and the new occupant has an indefeasible title to it, which he may transfer to a third party. A victorious Nation, in acquiring the sovereignty *de facto* over a country, from which it has expelled its adversary, does not acquire any other rights than those which belonged to the expelled Sovereign; and to those, such as they are, with all their limitations and modifications, he succeeds by Right of War. It is accordingly usual in treaties of peace, by which a territory, which has been occupied by a victorious Nation, is formally ceded to it, for the vanquished Power to stipulate that the inhabitants shall retain all their

[18] Vattel, L. III. c. 13. § 198. Schoell, Histoire Abrégée des Traités de Paix, Tom. IV. p. 213.

liberties and immunities; and as those liberties and immunities are the creatures of civil law, it is not uncommon to stipulate that the civil law of the conquered people shall be maintained, the victor being at liberty to introduce his own criminal law. Thus when the Dutch Colony of Cape Town surrendered to the British fleet in 1795, it was stipulated in the articles of Capitulation that the Dutch Law should continue to furnish the rules for interpreting all civil contracts and obligations; in other words, that the proprietary rights of the inhabitants should be regulated by the same law as heretofore.

State Papers and Public Archives.

§ 67. There is a class of movable property belonging to an Enemy which is exempt from capture and confiscation by a belligerent Power, such as State papers, public archives, judicial and legal records, land titles, &c. Such property is regarded as adhering to the Sovereignty of the country, and passing with it, and is as it were an appurtenance of the National domain. When a belligerent Nation takes possession of an Enemy's country, it sequesters the rents of the immovable domain, but it cannot rightfully alienate the domain itself. It is not until peace has been concluded, and the conqueror's title has been recognised by the vanquished, that the public domain becomes at the absolute disposal of the conqueror. So likewise with regard to all movable articles, which appertain to the Government of a country, and over which the Sovereign for the purpose of government has full dominion, they are at the absolute disposal of the conqueror for the purpose of government, whilst he is in possession of the country, but in practice they are not booty of war. They are in the nature of public proofs or evidences of Rights; and as in the case of private debts, the mere fact of the conqueror possessing himself of the documents relating to incorporeal Rights,

does not give to him the possession of the Rights themselves; so the possession of public documents is a possession barren of fruit to the conqueror, for his rights, as derived from force of arms, are simply those of *de facto* possession. A belligerent who should permit his troops to plunder or destroy the public archives of the Enemy Nation, or who should capture and carry away, as booty of war, State papers, or judicial and legal records, would carry on war in a manner not sanctioned by the modern practice of Nations. The plunder and destruction of public archives cannot in any way profit a belligerent, or promote the true object of war. On the contrary, their plunder and destruction is calculated to exasperate an Enemy Nation, as being an unnecessary injury inflicted upon it; whilst the loss of public documents, which are the basis and evidence of private property, may work infinite prejudice to innocent parties. For the same reason it would be an act of wanton barbarism for a belligerent who is compelled to evacuate an enemy's country, to carry away the public archives, and to attempt to sever them from the Sovereignty.

Public Libraries and Museums.

§ 68. With regard to Public Libraries and Collections of works of Art, such as pictures, statues, and other forms of sculpture, there is not the same agreement amongst text-writers, that a belligerent is restrained by practice from seizing and carrying them away as booty of war. All writers indeed are of accord, that to destroy such works wantonly would be to violate the modern usage of war;[19] but they do not agree in holding that it is inconsistent with the usage of war to carry off such works, as booty. The French armies, in the wars which attended the Revolution of 1789, carried off

[19] Kent, Commentaries, Vol. I. p. 93. Klüber, § 253. Vattel, L. III. c. 3. § 168.

all the finest works of genius and taste which they found in Italy, Holland, and other enemy-countries, and which were of a movable character. In some cases they obtained them by means of forced Contributions, in other cases by express Conventions with the conquered States. Upon the victorious entry of the Allied Powers into Paris in 1815, they found those treasures of Art collected together in the various galleries of the Louvre and other Museums. It appears from a note delivered in by Viscount Castlereagh to the Ministers of the Allied Powers, and placed upon the Protocols of Paris (11 Sept. 1815), that the Pope, the Grand Duke of Tuscany, the King of the Netherlands, and other Sovereigns, "claimed through the intervention of the High Allied Powers, the restoration of the statues, pictures, and other works of Art, of which their respective States had been successively and systematically stripped by the late Revolutionary Government of France, contrary to every principle of justice and to the usage of modern warfare."[20] Lord Castlereagh, on this occasion, placed on record the opinion of Great Britain, that works of Art have been invariably respected by modern conquerors, as inseparable from the countries to which they respectively belonged; and that to tear them away from the territories to which they appertained was a reproach to the Nation which had adopted such a principle of war. The French Commissioners on the other hand who concluded the military Convention under which the Allies took possession of Paris, appear to have considered that the Allies might with justice claim to exercise their right, as belligerents, to strip in the same manner the galleries of Paris of their spoils, as the French armies had exercised their right of spoliation in the countries

The Gallery of the Louvre in 1815.

[20] Martens, Nouveau Récueil, T. II. p. 632.

which they had overrun; for they proposed to introduce into the Convention an article which should secure to France the treasures of Art which she had amassed. But Prince Blucher would not assent to it on behalf of Prussia, and the Duke of Wellington rejected it in the interest of the other Powers. The Duke of Wellington was of opinion "that the Allies having the contents of the Museum justly in their power, could not do otherwise than restore them to the countries from which, contrary to the practice of civilised warfare, they had been torn during the disastrous period of the French Revolution and the tyranny of Bonaparte[21]." The Allied Powers acted upon this view of the Rights of War, and their conduct may be regarded as a practical affirmation on their part of the principle that Public Collections of works of Art are not booty of war, according to the modern usage of civilised Nations. American writers on Public Law are not altogether of accord with European publicists on this subject. Mr. Wheaton does not pronounce any decided opinion, but is content to quote a speech of Sir Samuel Romilly in the House of Commons on 20th Feb. 1815, expressive of his dissatisfaction with the conduct of the Allied Powers in 1815[22], as not altogether consistent with justice. The tendency however of Mr. Wheaton's remarks is in favour of the milder practice[23]. General Halleck on the other hand maintains that an impartial judge must conclude, on a careful examination of the circumstances connected with the formation and spoliation of the rich Museum of the Louvre, either that such works of Art

Opinion of the Duke of Wellington.

[21] Despatch of the Duke of Wellington to Viscount Castlereagh. Paris, Sept. 23, 1815. Martens, N. R. II. p. 642.

[22] Wheaton, Elements, Part IV. c. 2. § 6.

[23] Hansard's Parliamentary Debates, Feb. 20, 1815. Life of Romilly, Vol. II. p. 404, and Halleck, International Law, c. 19. § 10.

are legitimate trophies of war, or that the conduct of the Allied Powers in 1815 was in direct violation of the Law of Nations. It is impossible, he says, to avoid one or the other conclusion. A British Court of Prize has however administered in the case of American interests the Law of Nations in the same liberal spirit, in which Lord Castlereagh expressed the feeling of the British Government. In the case of a collection of Italian paintings and prints captured by a British vessel during the war of 1812, on their passage from Italy to the United States, the learned Judge (Sir Alexander Croke)[24] of the Vice-Admiralty Court at Halifax, directed them to be restored to the Academy of Arts in Philadelphia, on the ground that the Arts and Sciences are admitted amongst all civilised Nations to form an exception to the severe rights of war, and to be entitled to favour and protection. They are considered not as the *peculium* of this or that Nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the Law of Nations, as practised by all civilised countries."

Decision of British Prize Courts.

Public Edifices.

§ 69. The modern practice of warfare exempts from wanton destruction Public Edifices, which do honour to human society and do not increase the enemy's strength, such as religious edifices, public monuments, repositories of art and science, hospitals, and charitable institutions; in a word, all public structures devoted exclusively to civil purposes.[25] There may be cases in which the destruction of such buildings may be the accidental or necessary result

[24] The Marquis de Somerueles. Stewart's Vice-Admiralty Reports, p. 482 (21 April 1813).

[25] Vattel, L. III. c. 9. § 168. Grotius, L. III. c. 12. § ii. 3.

of military operations. But it is usual even in siege operations for the beleaguering party to avoid directing the fire of his artillery against the churches and hospitals of the besieged town. Amongst heathen Nations what were called *res sacræ* were not exempt from capture and confiscation; but the contention of the worshippers of Heathen Deities was supposed to involve a conflict between the Deities themselves; or in cases where the belligerent parties worshipped the same Deities in common, the Deities were held to have abandoned the temples of the vanquished Nation at the moment when victory declared itself in favour of the adverse party. Cicero has well expressed the sentiment of the heathen world, when he says that victory made all the sacred things of the Syracusans profane[26]. But a Christian Enemy in the present day respects the mosques of the followers of Mahomet and the temples of the votaries of Buddha, as edifices of religion, equally with the churches of the believers in Christ, in which he himself worships. So likewise with regard to public edifices of a civil character, if modern usage has sanctioned their destruction without necessity, it has been by way of vindictive Retorsion or Reprisals. Thus, when the British forces in 1814 destroyed the Capitol, the President's house, and other public edifices at Washington, the justification of the act was rested by the British Admiral on the ground of retaliation for the wanton destruction committed by the troops of the United States in Upper Canada. The correspondence between Mr. Secretary Munroe[27] and Admiral Cochrane on this subject, is interesting and instructive, for it shows that both parties considered

Destruction of the Capitol at Washington in 1814.

[26] Cicer. Orat. in Verrem 4. III. pp. 693, 694. Wheaton's
[27] American State Papers, T. Elements, part IV. c. 2. § 6.

such acts of devastation as *abnormal*, and as involving a departure from the ordinary practice of civilised warfare. It is to be regretted that Great Britain retaliated *in kind* on this occasion, for the *lex talionis* is not the rule of modern warfare; and if one of the belligerent parties should have placed itself in the wrong by having recourse to exceptional measures, the balance cannot be redressed in the right manner by the adversary having recourse to identical measures, and so placing himself *in pari delicto*. When Prince Blucher proposed to blow up the Bridge of Jena, and to overthrow the Column of Austerlitz upon the Allied Powers entering Paris, he sought to retaliate upon the French Nation the acts of wanton destruction and desolation which they had inflicted upon the Prussian Nation; but the Allied Powers wisely and prudently withstood Prince Blucher's desire. An example of a wiser practice was shown by the Emperor Francis of Austria in regard to the Arch of the Simplon, which Napoleon had erected in Milan to commemorate his victories over the Austrians. The history of those victories was given in a series of bas reliefs, the last of which represented Napoleon dictating peace to the Emperor Francis in Vienna. The Emperor Francis directed the historical series of bas reliefs to be completed, and opposite to the bas relief representing the Emperor Napoleon dictating peace to the Austrians at Vienna, the Arch at present exhibits a bas relief representing Napoleon's subsequent abdication at Fontainbleau.

Arch of Simplon.

§ 70. There is a class of movable property belonging to an Enemy, which whether it be of a public or private nature, is invariably treated as booty of war, if it is found within the territory of the Enemy. Whatever moderation may be exercised towards private property on land by a victorious

Property water-borne in an enemy's ports.

belligerent, the extreme right of seizure and confiscation is exercised by him against the shipping which may be found within an enemy's ports. M. de Hautefeuille observes, in explanation of the exercise of the extreme Right of a belligerent in this particular, that mariners are the hardiest and most courageous portion of the population of a country, and that ships are calculated to become instruments of warfare, or at least to serve the purposes of war. The capture and destruction of such property has accordingly a direct tendency to impair the military power of the enemy and to reduce him to the necessity of making peace. It would be therefore a questionable act of humanity to proscribe the destruction of it. The same reason however does not tell so forcibly in support of the capture and confiscation of the cargoes which are afloat in ports, and are the property of private citizens. The explanation of the difference in the practice of belligerents in confiscating private property which is afloat, whilst the private property of Enemy-Subjects on land is spared, may be sought in the fact, that such property is at the time of capture actually employed in promoting the Enemy's commerce and navigation, which are justly regarded as the sources and sinews of his naval power, and that the destruction of the latter can only be brought about effectually by the capture and confiscation of such private property, seeing that the State rarely, if ever, embarks in enterprises of commerce[28]. It is upon similar considerations that a cargo belonging to enemies and found afloat in the port of a belligerent Nation at the breaking out of war is confiscable *jure belli*, whilst an enemy's property on land is not, according to the modern practice, liable to confiscation.

[28] Wheaton, Elements, part IV. c. 2. § 7.

Distinction between booty and prize.

§ 71. With regard to enemy's property captured on land, and which is properly termed *booty* of war, a different Forum exercises jurisdiction over it from that which decides upon all questions of captures at sea, which are properly termed *prize* of war. The latter has devolved to the Courts of Admiralty, by virtue of the jurisdiction exercised in olden times by the Lord Admiral of the Fleet, whilst the former appertains to that branch of the military jurisdiction exercised by the Commander-in-Chief of an Army in the field. Courts of Admiralty accordingly take no cognisance of questions of booty. In very early times in England, causes respecting booty were determined in the Court of Chivalry, before the Constable and the Marshal of the King. Lord Hale[29] observes that in matters civil, for which there is no remedy by the Common Law, the military jurisdiction continues as well after the war as during the time of it; for that part of the jurisdiction of the Constable and the Marshal stands still, notwithstanding the war determines, as concerning right of prisoners and booty, military contracts, &c. We find accordingly that the Court of Chivalry took cognisance of goods taken beyond the seas, of prisoners, of hostages, of ransom, &c.; and the statute of 13 Richard II. c. 2, in limiting its jurisdiction to contracts and things touching war which cannot be determined by the Common Law, directed its proceedings to be governed by the laws and customs of war. After the office of Lord High Constable of England ceased in the thirteenth year of Henry VIII. the jurisdiction of the Court of Chivalry came to be disputed on the grounds that the Earl Marshal alone was not competent to hold the Court, and it

Court of Chivalry.

[29] De Prærogativa Regis, c. 12. § 3. Crompton on the Jurisdiction of Courts. Rymer, Fœd. VIII. p. 211 and 423.

seems ultimately to have fallen into desuetude[30]. The last case heard before it was that of Sir Henry Blunt in 1737[31]. The modern practice in England in respect of the distribution of booty of war, is for the Crown to refer the claims of those, who petition for a share of the distribution, to the Lords of the Treasury, who under the advice of the Law Officers of the Crown, settle a scheme of distribution for the approval and sanction of the Crown itself,[32] as all acquisitions of war belong of Right to the Crown, *parta bello cedunt reipublicæ*[33]. A Statute, which was passed in 1840[34], extends the jurisdiction of the High Court of Admiralty of England to all matters and questions concerning booty of war or the distribution thereof, which it shall please the Crown, by the advice of the Privy Council, to refer to the judgment of that Court; and in all matters so referred the Court is to proceed as in cases of prize of war, and the judgment of the Court therein is to be binding upon all parties concerned. The High Court of Admiralty may accordingly under this Statute, exercise a jurisdiction in cases of booty, apart from, but analogous to, its jurisdiction in questions of prize, with this difference however, that whilst it has a customary jurisdiction over all questions of prize, it can only exercise its statutory jurisdiction over such questions of booty, as the Crown, with the advice of the Privy Council, may be pleased to refer to its judgment.

Extension of the Admiralty Jurisdiction over booty.

30 Lindo *v.* Rodney, 1 Douglas, p. 593. The Army of the Deccan, 2 Knapp, p. 149.

31 Sir H. Blunt's case, 1 Atkyns, p. 296.

32 The Army of the Deccan, 2 Knapp, p. 106. Buenos Ayres, 1 Dodson, p. 28. Elphinstone *v.* Bedreechund, 1 Knapp, p. 360.

33 The Elsebe, 5 Ch. Rob. p. 181.

34 3 and 4 Vict. c. 65. § 22.

CHAPTER V.

RIGHT OF A BELLIGERENT ON THE HIGH SEAS.

The Maritime intercourse of Nations subject to special rules in time of War—Object of war—Enemy's property on the High Seas—Institution of the Office of Admiral—Establishment of an Admiralty Jurisdiction of Nations—Order of Prize Proceedings recognised by Treaties—The Rooles or Jugemens d'Oleron—The Consolato del Mare—General Rule amongst Nations down to the middle of the Sixteenth Century to distinguish the Ship from the Cargo—Règlement of Francis I. of France in 1543—Edict of 1584—French doctrine of Hostile Infection—Ordonnance de la Marine of 1681—Spanish Ordenanza de Corso of 1718—French Règlement of 1778—Law of the French Prize Courts down to 1854—Sir William Grant—Rule of the United States of America—Wheaton—Chancellor Kent—Bynkershoek—Freight of enemy's goods upon capture payable to neutral shipowners—Measure of freight—The Grand Pensionary de Witt, founder of the doctrine of Free Ships, Free Goods—Treaty of Paris of 1646—Dutch Treaties with Spain and Portugal—British Treaties with Portugal and the States General—Treaties of Utrecht in 1713—Armed Neutrality of 1780—Four systems of Maritime Law—The Natural system of the Consolato del Mare—The French system of the Ship and Cargo mutually infecting each other—The Dutch system of the Cargo following the character of the Ship—The System of the Congress of Paris as embodied in its Declaration of 16 April 1856, that the Neutral Flag covers the Cargo—Adhesion of all the European Powers to it, with the exception of Spain—Spain and Mexico and the Confederate States of America have adopted the last three articles of the Declaration, as part of their own legislation—The United States of America have declared their intention to observe the three last articles—Accession of the South American States to the Declaration of Paris—

Protocol No. 24. annexed to that Declaration—Territorial Theory of Hübner—Doctrine of Martens—Bynkershoek's and Lampredi's Objections—Manning's Refutation of Hübner's Theory—The Passport, the true criterion of a ship's national character—The Sea Letter—It is conclusive of the national character of a merchant ship—Belligerent right of visitation and search—Case of the Swedish Convoy—Vattel—Chancellor Kent—Convention of the Baltic Powers in 1801—Wheaton—Right of Approach—Regulation of the right of visitation and search—Rule of an Affirming Gun—Lampredi's view—Mr. Justice Story's opinion—General Halleck—Sir Robert Phillimore—Heffter—Treaty of the Pyrenees—Practice of Nations as to ship's papers—Builder's Contract or Bill of Sale—Certificate of Registry, if required by Municipal Law—Necessary cargo-papers—Ship's manifest and bills of lading—Charter-party—Absence of ship's papers or of cargo papers justifies the detention of a vessel for enquiry—Right of Detention—Neutral merchant vessel may not sail under convoy—Chancellor Kent—Wheaton—A neutral merchant may not embark his goods in an armed ship of the enemy, according to the judgment of the British Prize Courts—The Prize Courts of the United States in conflict with British Prize Courts on this subject.

Maritime intercourse of nations.

§ 72. THE open Sea is not capable of being reduced into the possession of any Nation, and accordingly can never become part of the territory of a Nation. There is therefore no juridical objection *ratione loci* to a Nation freely prosecuting its Right by force against another Nation upon the open Sea. On the other hand, all Nations are entitled to the free use of the open Sea for the purposes of innocent Navigation; and no Nation can claim with reason to prosecute its Right by force against another Nation upon the open Sea in such a manner, as to interfere with the innocent Navigation of it by other Nations, which are not parties to the contention. It is obvious, however, when two Nations are contending by force in the prosecution of Right, that their relations, as belligerents, will differ essentially from the relations of

Nations which are at peace with one another; and in order that the Navigation of the open Sea by other Nations at such a time should have an innocent character, it must be so conducted as not to work any prejudice to the contention of either belligerent, as such. The conditions, therefore, under which Nations may innocently navigate the open Sea in time of war, will differ very materially from the conditions under which they may so navigate it in time of peace; and although there may be no conflict of principle between those conditions, the reason of the thing suggests that the maritime intercourse of Nations in time of war will be governed by very different rules from those which prevail in time of peace.

Object of war.

§ 73. The primary object of War being the reparation of damages, War for the most part implies Reprisals against the property of an enemy. But War differs so far from Reprisals, that whereas the latter are grantable against the ships and goods of an enemy *ad damni dati modum et damnorum consequendorum causa*, and all Reprisals, as distinguished from War, cease, when full satisfaction has been obtained; War, on the other hand, may contemplate, in addition to redress, the punishment of injustice or violence, and the taking of security against future injury, by depriving an enemy of some part of his property or possessions. Again War may be undertaken to prevent injustice or violence; in which case there will be no place for Reprisals as such, but the belligerent will be entitled of Natural Right to deprive his enemy of everything which tends to augment his strength and to enable him to do injustice or violence. Every belligerent endeavours to accomplish this object in the manner most suitable to himself; and whenever an oppor-

tunity presents itself, he takes possession of the property of his enemy and confiscates it to his own use, thereby diminishing his enemy's power to carry on the war, whilst he secures at the same time to himself an equivalent for the expenses and losses incurred in the prosecution of it[1]. The movable property equally with the houses and lands of an Enemy-Nation is accordingly liable to be taken by a belligerent and confiscated to his own use, not merely when such movable property is found within the territory of an enemy, but when it is found on the High Seas, there being no juridical impediment *ratione loci* to a belligerent seizing the property of his enemy in a place which is *nullius territorium*. If a belligerent cruiser accordingly meets a merchant vessel on the open Sea, and the vessel or its cargo belongs to an enemy, it is consistent with the primary object of all war, that the belligerent should do justice to himself by taking possession of his enemy's property and converting it to his own use. Property so taken by a belligerent from an enemy on the high sea is termed prize (prise) of war, whilst property taken from an enemy on land is termed booty (butin) of war[2]. No juridical difficulty can arise when the property of an enemy found on the high sea is not mixed up with the property of a neutral; but it may happen in the case of a ship and its cargo, that the ship itself is the property of several owners, one or more of whom are the subjects of a Neutral Power; or the vessel may be the property of a neutral merchant and the cargo the property of an enemy; or the vessel may be enemy's property, and the cargo neutral property; or the cargo may be

Enemy's property on the high seas.

[1] Vattel, L. III. c. 161.

[2] The French word *Butin* is supposed to be a diminutive of the Low German word *Bute*. Cf. Dictionaire de Trevoux.

owned in part by an enemy and in part by a neutral. When movable property is found in the territory of an enemy, the *locus in quo* determines the right of a belligerent to take possession of it, for everything which is in the territory of an enemy is *primâ facie* appurtenant to his territory, *Quicquid est in territorio est de territorio;* but as the open Sea cannot become the territory of any Nation, no similar rule can determine the right of a belligerent to take possession of a ship or its cargo on the open Sea, and the ownership of the property thus becomes the test of its liability to make good the damages and expenses of the belligerent, and of his right to take possession of it.

The office of Admiral.

§ 74. If we go back to the early Laws of the Sea, we find the juridical distinction taken between armed vessels and merchant vessels. An armed ship might be simply navigating the high sea or cruising (en course). If an armed ship was cruising, she was engaged in making reprisals or in making war, the expression originally made use of in Letters of Marque being the same as in the ancient formulary of declaring war, which enjoins all subjects *courir sus à l'ennemi.* But this expression was borrowed from an earlier state of things, when the police of the High Seas was maintained by voluntary associations amongst merchants. In the state of wild anarchy, to which the navigation of the High Seas was subject after the breaking up of the Roman Empire, when the Norman sea-rovers infested the North Sea and the Baltic, and the Saracens and Greeks covered the Mediterranean Sea with piratical vessels, every merchant ship navigating the High Seas with a valuable cargo was liable to pillage. It was in vain for the plundered trader to prefer his complaint to the Sovereign of the country, from

which the piratical vessel had been fitted out; the Sovereign was either too feeble to do justice upon the criminals, or was conniving at their crimes. Merchants accordingly were obliged to associate themselves together for mutual protection; and their vessels sailed forth in fleets, of which a chief was elected, called the Admiral. The rule of these Associations was in the first place mutual defence, and secondly joint participation in all prize, which might be made in the conduct of such mutual defence. Every vessel of a fleet was bound to obey the Admiral, not merely as a leader in battle, but as a judge in dividing the prize made from the enemy; and the usages of such Associations in their expeditions against pirates, for they fitted out at times fleets of armed vessels expressly to cruise after pirates (*per la guerra del corso*), came by degrees to be the usages of Nations in their warfare on the High Seas. Such a result seems to have been brought about in this manner. Independent Princes were fain to enlist into their service the armed fleets of these voluntary Associations, when the occasion presented itself of attacking an enemy by sea, or the necessity arose of defending themselves against any attack by sea. Thus there was a mercantile Association at Pisa, called the *Umili*, which was constituted after the likeness of an independent State[3], waging war and making conquests with a military marine of its own. It lent its powerful aid to the Princes of Austria in A.D. 1188, and obtained from them in return special privileges for the Company[4]. But in enlisting the

3 The British East India Company was a striking instance in modern times of a voluntary association of merchants exercising, amongst other attributes of an independent State, the right of making war and peace.

4 Muratori Antiq. Ital. Medii Ævi, Tom. II. col. 910 et seq. Pardessus, Tom. II. Introduction, p. 127.

services of the armed fleets of this and other Merchant-Associations, Sovereign Princes found it both necessary and expedient to allow them to observe the rules to which they had been accustomed to conform themselves, in the conduct of their own maritime expeditions, more particularly as those rules were based for the most part upon principles of Natural Right; and thus the sanction of Nations as such, was given by degrees to the maritime usages of these Merchant-Associations, and so they became the Customary Law of the Sea.

Admiralty Jurisdiction of Nations.

§ 75. The necessity for these voluntary Associations of merchants continuing to maintain the police of the High Seas by armed fleets, equipped at their own cost, and subject to an Admiralty jurisdiction of their own, ceased by degrees, according as Sovereign Princes took upon themselves the duty of exercising a Supreme Admiralty jurisdiction, which in the course of the thirteenth century came to be considered amongst the leading States of Europe to be a Prerogative of Sovereign Power. In the fourteenth century we find a custom growing up for Sovereign Princes to restrain their Subjects from doing justice to themselves on the High Seas, unless there should have been previously granted to them Letters of Marque and Reprisal; and in the fifteenth century it may be said to have become established Law, as between Nations, that an armed cruiser should be furnished with Letters of Marque or with Letters Patent under the seal of a Sovereign Prince in the nature of a Commission, in order that it should be entitled of Right to make Reprisals or War. The terms upon which these Letters of Reprisal and Commissions to make War were grantable, required, that whatever was taken by an armed cruiser should be brought to open judgment in the Admiral-Court,

and thus the Admiral-Court came to be an International Court of Prize, and the rules which had been adopted for the regulation of maritime warfare, whilst it was carried on by the voluntary Associations of merchants under the control of an Elective Admiral, came to be the rules of maritime warfare between Nations and the Law which the High Courts of Admiralty administered in questions of Prize taken upon the High Seas. The process of these Courts was framed after the best models which the Roman Law afforded; and the regulations for prize proceedings of the fifteenth century are identical with the practice of the present time. The observance of one uniform system amongst Nations was confirmed by treaties, the articles of which were of a declaratory character; and amongst these the Treaty of Boulogne[5], concluded between Charles VIII of France and Henry VII of England, on 24 May 1497, is most deserving of notice, as being a complete exposition of the prize proceedings of those times[6].

Order of prize proceedings.

§ 76. One of the earliest collections of the Customs of the Sea is the Consolato del Mare, which owes its origin most probably to the same cause which led to the compilation of the Rooles or Jugemens d'Oleron, the groundwork of the Black Book of the Admiralty. The institution of special Judges or Arbitrators to decide upon questions of Right between mariners and merchants gave rise to decisions upon controverted questions, a record of which became necessary to guide the Judges them-

Customs of the Sea.

5 Robinson, Collectanea Maritima, p. 83. Dumont, Traités Tom. III. Part I. p. 376.

6 The tenth article of this treaty provides that the Municipal Courts shall be restrained from interfering with the free action of the Admiralty Court in matters of prize.

selves, as well as to supply to the merchants and shipowners a knowledge of their respective rights and obligations. The Rooles d'Oleron[7], the earliest portion of which has with good reason been assigned to the latter part of the thirteenth century, may be regarded as the basis of the Maritime Law of Western Europe. There is not found in this compilation any reference to the Customs of the Sea in time of war; but in the Consolato del Mare, which was probably compiled in the latter part of the fourteenth century, there are several chapters[8] treating of questions between the armed vessels of belligerents and the trading vessels of neutrals, as well as of questions between the owners of ships and the owners of cargoes incidental to the exercise of the rights of war by belligerents on the high sea. The Consolato del Mare seems with great probability to have been first published at Barcelona, the chief seat of the maritime tribunals of Catalonia; and we may account for the introduction into this work of various chapters on questions appertaining to maritime warfare by the twofold consideration, first, that the system of maintaining the peace of the Seas against pirates by voluntary Associations of merchants was first developed effectively in the maritime cities on the shores of the Mediterranean; and secondly,

The Rooles d'Oleron.

The Consolato del Mare.

7 M. Pardessus considers the articles forming the first series of the Rooles d'Oleron to be of an earlier origin than A.D. 1266, inasmuch as in that year Alphonso X of Castile caused them to be inserted under the title of El Fuero de Layron in the fifth part of the Collection of Laws, known as Las Siete Partidas. Pardessus, Lois Maritimes, Tom. I. p. 301. Mr. Hallam on the other hand considers the Rooles d'Oleron to have been chiefly borrowed from the Consolato, and to have been compiled in France under the reign of Louis IX. Hallam's Middle Ages, c. 9. Part II.

8 C. 221. [276.] Du navire chargé de marchandises pris par navire armé. C. 243. [288.] Du cas où un navire marchand est rencontré par un navire d'ennemis. C. 245. [290] Du navire pris et recouvré.

that there was a permanent State of War upon the waters of the Mediterranean between the Christian and the Saracen corsairs[9], the conduct of which it had been found expedient by both parties to place under some regulations. Thus Fanucci[10] cites an example of a date as early as A. D. 1164, from which it would appear that the Right of Visitation and Search was recognised at that time both by Christian and by Mahommedan Powers, as a belligerent Right in regard to Neutrals; and we find in certain chapters of the Consolato del Mare, and in various other collections of Sea Laws of the fourteenth century, express regulations as to the incidents of battle with Saracen vessels.

Distinction of ship from cargo.

§ 77. Looking then to the Consolato del Mare as the tradition of the early jurisprudence of the Middle Ages, in regard to belligerent and neutral rights on the High Seas, we find that in the fourteenth century, in order to reconcile the free action of a Belligerent against the property of an enemy with the respect due to the property of a Neutral Subject, a rule had become established under which neutral property, although laden on board of an enemy's ship, was not subject to confiscation upon the capture of the ship; and reciprocally a neutral ship laden with enemy's goods was to be restored to its owner, upon the delivery of its cargo to the belligerent captor. As the primary object of war is to work Corrective Justice by exacting compensation for damage which has been inflicted, the mode by which

9 The term Corsair was originally applied as a generic term to any vessel fitted out *per la guerra del corso*. In later times its use has been confined to vessels engaged in predatory warfare, such as was waged by the Barbary Corsairs against all Christian traders.

10 The documents cited by Fanucci, Tom. II. p. 80, are referred to in Pardessus, Lois Maritimes, Tom. II. Introduction, p. 122.

a belligerent Power brings about this result is by seizing the goods not only of the actual wrong-doer, if they can be met with at sea, but also the goods of other subjects of the Sovereign Prince, who, as such, ought to control the conduct of the actual wrong-doer and constrain him to make reparation; and thereupon either detaining them as a security until justice is done, or confiscating them as an equivalent for the loss which has been sustained. The action of a belligerent, accordingly, in seizing ships[11] or their cargoes on the High Seas, should in reason and justice be confined to the property of enemies. It will therefore not excite surprise to find that the Common Law of the Sea in matters of prize in the fourteenth century, as it did not proceed upon any principles of Empire, but was framed upon considerations of Corrective Justice, was so far consistent with Natural Right (suum cuique) that neutral property was sacred upon the common highway of Nations, whilst enemy's property, wheresoever found, was good prize. The recognition of this principle may be traced back to the thirteenth century, as it is found to be the basis of a compact between the city of Pisa and the city of Arles, A. D. 1221[12]. In the course of the next century, to which the compilation of the Consolato del Mare has been referred, we find the same principle embodied in treaties which Edward III of England concluded, on the one hand with the maritime cities of Biscaye and Castile A. D. 1351, and on the other hand with the towns of Portugal[13] A. D. 1353; and thus the Customs of

[11] Statute of Marseilles, L. II. c. 30. Cf. Ducange, Glossarium, vox *Laudum*, which signifies Jus recipiendi quod suum est, atque ob id manum injiciendi in bona vel corpus debitoris.

[12] Muratori Antiquitates Italicæ Medii Ævi, L. IV. col. 398.

[13] Rymer, Fœdera, Tom. III. Part I. p. 71 and 88.

the Mediterranean Sea came to extend themselves amongst the merchants and mariners of the Western and Northern Seas. In the following century the Duchy of Burgundy A. D. 1406[14], the City of Genoa A.D. 1462[15], the Duchy of Brittany A. D. 1468[16], and the Duchy of Austria A.D. 1495[17], entered formally into the same system of prize law by treaties concluded with England; and the general practice of European Nations in the fifteenth century may be said to have been uniform in this matter, and so to have continued until the middle of the sixteenth century, when Francis I of France, avowedly with the object of checking neutral frauds, directed the Admiralty of France, by the Règlement of A. D. 1543, to condemn the goods of a friend found on board the ship of an enemy, and the ship of a friend, if it should be found laden with enemy's goods.

Règlement of 1543.

§ 78. The practice which France has pursued since the Règlement of 1543 has been subject to fluctuations. An Edict of Henry III (A. D. 1584) laid down the same rule for the French Prize Courts which had been promulgated by Francis I, proceeding upon the principle of *hostile infection*, as expressed by the maxim of "Robe d'ennemi confisque celle d'ami. This maxim had been justified by the celebrated French jurist Mornac, upon a suggested analogy with a provision of the Roman Civil Law[18], according to which a vehicle carrying prohibited goods was liable to confiscation with the goods themselves. In 1650 the doctrine of hostile infection was so far relaxed, that whilst enemy's property

Edict of 1584.

French doctrine of hostile infection.

[14] Rymer, Fœdera, Tom. IV. Part I. p. 3.
[15] Ibid. V. Part II. p. 92.
[16] Ibid. V. Part II. p. 161.
[17] Ibid. V. Part IV. p. 85.
[18] Dominus navis si illicite aliquid in navi vel ipse, vel vectores imposuerint, navis quoque fisco vindicatur. Dig. L. XXXIX. Tit. IV. c. 2. § 2.

was to be confiscated, the goods of friends were to be restored to them; but the famous Ordonnance de la Marine of Louis XIV. A. D. 1681[19], revived all the severity of the earlier Regulations of 1543 and 1584. Spain, under the sceptre of the House of Bourbon, followed in the wake of France, and by Article IX of her Ordenanza di Corso A. D. 1718, adopted the provisions of the Ordinance of Louis XIV[20]. It was not until A. D. 1744 that some relaxation in the severity of the Ordinance of Louis XIV was introduced by an Order in Council[21], directing that whilst enemy's goods should be confiscable on board of a neutral vessel, the vessel itself should be restored to its owners; but this order, says Valin[22], was only made from a reference to particular treaties, and in order to give effect to treaty-engagements with particular Powers. The doctrine of hostile infection was at last definitively set aside by the Règlement of 26 July 1778[23], under which, whilst neutral ships carrying contraband of war destined for the enemy were not to be confiscated unless three fourths of their cargo were contraband, privateers were forbidden to seize and detain neutral vessels, unless they were destined to a blockaded or besieged place[24]. The Conseil des Prises in France has interpreted this Règlement to imply the principle of Free Ships, Free Goods; and although its operation was suspended for a

Ordonnance de la Marine of 1681.

Spanish Ordenanza di Corso of 1718.

French Règlement of 1778.

[19] Lebeau, Code des Prises, Tom. I. p. 80.

[20] D'Abreu, Prises Maritimes, c. 9. § 13.

[21] Lebeau, Tom. I. p. 471.

[22] Valin, Ordon. de la Marine, L. III. Tit. IX. Art. VII.

[23] Lebeau, Code des Prises, Tom. II. p. 38. Martens, Récueil, Tom. III. p. 19.

[24] By the Ordinance of 1780 Spain declared that enemy's property should be taken out of neutral ships, and the ships be allowed to go free, whilst freight was to be paid on the goods taken out of them.

short time by the Law of 29 Nivose of the year VI of the Republic[25], whereby a vessel was held to have a friendly or hostile character according as the cargo on board of it belonged to a friend or an enemy, it was once more revived by the Decree of 22 Frimaire, of the year VIII of the Republic[26], and it may be considered to have been the Law of the French Prize Courts down to the breaking out of the war against Russia in 1854. An eminent English Judge (Sir William Grant) in delivering the judgment of the Lords of Appeal in Prize Causes in 1801, upon an incidental question arising in the case of a vessel warranted Swedish property (Sweden being then neutral in the war between Great Britain and France), which had been confiscated by a French tribunal in the Isle of France, as enemy's property, under the French Ordinance of 1778, observed, in reference to the various French Ordinances in matters of prize, that when Louis XIV published his famous Ordinance of 1681, "nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance the principles of marine law, as then understood and received in France. I say, as understood in France; for although the Law of Nations ought to be the same in every country, yet as the tribunals which administer the Law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in different countries, which acknowledge its authority. Whatever may have been attempted, it was not at the period now

Law of the French Prize Courts.

[25] Lebeau, Code des Prises, Tom. III. p. 475. L'état des navires, en ce qui concerne leur charactère de neutre ou d'ennemi, sera déterminé par leur cargaison.

[26] Ibid. Tom. III. p. 615.

referred to supposed, that one State could make or alter the Law of Nations; but it was judged convenient to establish certain principles of decision, partly for the purpose of giving an uniform rule to the Courts, and partly for the purpose of apprising Neutrals what that rule was." The same learned Judge, in commenting upon the administration of the law of Prize by the French Courts, under the direction of these Ordinances, observes "that they have not taken them as positive laws binding upon Neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation[27]."

United States of America.

§ 79. The Rule of the Consolato del Mare has been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be a correct exposition of the Usage of Nations. "The rule," says Chief-Justice Marshall, "that the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are to be restored, is believed to be a part of the original Law of Nations, as generally, perhaps universally, acknowledged. This rule is founded on the simple and intelligible principle, that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical exposition of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy's property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The cha-

[27] Marshall on Insurance, Vol. I. p. 423.

racter of the property, taken distinctly and separately from other considerations, depends in no degree upon the character of the vehicle in which it is carried[28]." To the same effect Mr. Wheaton observes, "Whatever may be the true original abstract principle of National Law on this subject, it is undeniable that the constant usage and practice of belligerent Nations from the earliest times have subjected enemy's goods in neutral vessels to capture and condemnation, as prize of war. This constant and universal usage has only been interrupted by treaty-stipulations, forming a temporary conventional law between the parties to such stipulations[29]." Chancellor Kent, in like manner, affirms it to be "a well settled principle of the Law of Nations, that neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel beyond the limit of the neutral jurisdiction[30]." "It is also a principle of the Law of Nations relative to neutral rights, that the effects of neutrals found on board of enemy's vessels shall be free; and it is a right as fully and firmly settled as the other, though, like that, it is often changed by positive agreement. The principle is to be found in the Consolato del Mare, and the property of the Neutral is to be restored without any compensation for detention and the other inconveniences incident to the capture. The former Ordinances of France of 1543, 1584, and 1681, declared such goods to be lawful prize; and Valin[31] justifies the Ordinances on the ground that the Neutral, by putting his property on board of an

Wheaton.

Chancellor Kent.

[28] The Nereide, 9 Cranch's (American) Reports, p. 418.

[29] Elements of International Law, Part IV. c. 3. § 19.

[30] Commentaries on American Law, Tom. I. § 124.

[31] Comm. sur l'Ordonnance de la Marine, L. III. Tit. IX. Des Prises, Art. VII.

enemy's vessel, favours the enemy's commerce, and agrees to abide the fate of the vessel. But it is fully and satisfactorily shown, by the whole current of modern authority, that the Neutral has a perfect right to avail himself of the vessel of his friend to transport his property; and Bynkershoek has devoted an entire chapter to the vindication of the justice and equity of this right[32]."

Bynkershoek.

§ 80. The Common Law of Nations, which declares the property of an enemy found on the High Seas in the vessel of a friend to be good prize of war, provides at the same time that the friendly shipowner shall not suffer any prejudice by reason of a belligerent doing justice to himself by confiscating the property of his enemy. If a friendly shipowner is simply the carrier of enemy's property on the High Seas, and does not seek in any way to evade or baffle enquiry on the part of a belligerent cruiser with a view to screen the cargo from capture, his conduct is not inconsistent with neutrality; and reason suggests that the neutral carrier, in case the cargo should be confiscated by the belligerent, should not incur any loss by reason of the voyage, which was in its inception perfectly innocent, being prematurely terminated in the interest of the belligerent. If a belligerent cruiser accordingly arrests the voyage of a neutral merchant vessel on the High Seas, and claims to have the cargo, as being the property of an enemy, delivered up to him or carried into port, as the case may be, the belligerent is bound to pay the neutral shipowner an adequate freight for the carriage of the cargo. The belligerent has no cause

Freight payable to neutral shipowners.

[32] Quæstiones Juris Publici, L. I. c. 14. Ratione consulta, non sum qui videam, cur non liceat capere res hostiles, quamvis in navi amica repertas, id enim capio quod hostis est, quodque jure belli victori cadit. Kent's Commentaries, Tom. I. p. 128.

of grievance against the neutral shipowner as long as the conduct of the latter is perfectly impartial: under such circumstances his rights, as a belligerent, are solely against his enemy; and if he takes possession of his enemy's property *jure belli*, he takes it under no better conditions than those under which the enemy can himself claim it, namely, with the lien of the freight upon it. A distinction however has been so far made in favour of the belligerent, that he is not burdened with an unreasonable *præmium* upon a voyage evidently hazardous, although such *præmium* may not have been inequitable as between the enemy-shipper and the neutral shipowner. Considerations of various kinds may have influenced the parties to the contract of affreightment, and may have rendered a contract for an advanced rate of freight real and fair between those parties; but the freight, as a burden upon the belligerent captors, does not come loaded with those considerations. The captor is bound indeed to pay an adequate remuneration for the carriage of the cargo of which he has taken possession by virtue of the right, which a state of war confers upon him, as against his enemy; but the charter-party is not the measure by which the captor is always bound, even where its terms are not colourable nor liable to any imputation of fraud. For instance, the trade may be subject to extraordinary risk and hazard from its connection with the events of war and the activity and success of the belligerent cruisers; and it would be unreasonable for the captor to be called upon to make good an undertaking to pay an extraordinary premium, the specific purpose of which was to encourage the neutral shipowner to use his best efforts to defeat the captor's vigilance. The rate of freight given for the carriage of similar goods under

Measure of freight.

ordinary circumstances is the standard, by which the liabilities of the belligerent captor towards the neutral shipowner are to be measured[33].

§ 81. The Conventional Law of Europe down to the commencement of the seventeenth century seems to have been almost *uno tenore* confirmatory of the rule of the Consolato del Mare, that enemy's goods found on board of a neutral vessel were good prize.

Grand Pensionary De Witt.

It is to the Grand Pensionary De Witt that the introduction of the principle of the neutral Flag covering the Cargo is due; and the treaty by which that statesman laid the foundation of the novel doctrine of Free Ship, Free Goods, was the Treaty of Paris[34], concluded on 18 April 1646, between Holland and France, whereby Louis XIV agreed that for four years Dutch vessels laden with enemy's property, not contraband of war, should with their cargoes be exempt from capture. The language of this treaty[35] would seem to support the construction put upon it by De Witt, that it provided for the perfect freedom of the Dutch carrying trade; but De Witt found to his surprise that the French interpreted the Treaty merely to provide for the temporary suspension of the Ordonnance of King Henry III (A. D. 1584), according to which enemy's goods forming part of the cargo of a neutral vessel infected the remainder of the cargo and the vessel itself, and led to the condemnation of both, as good prize. In the course of a few years the Dutch

Treaty of Paris of 1646.

33 Vattel, Droit des Gens. L. III. c. 7. § 115, 116. The Twilling Riget, 5 Robinson, p. 82.

34 Dumont, Traités, Tom. VI. Part I. p. 342.

35 Art. I. En telle sorte que les Navires, qui trafiqueront avec la Patente de l'Amiral des Provinces Uniés seront libres et rendront aussi toute leur charge libre, bien qu'il est dedans de la Marchandise, même des grains et légumes appartenans aux ennemis, sauf et excepté toutefois les marchandises de contrebande.

obtained the assent of Spain (A. D. 1650) and of Portugal (A. D. 1661), to the provision that the goods of an enemy found on board of a neutral vessel should be free, whilst the goods of a neutral found on board of an enemy's vessel were to be good prize. In 1662 (27 April) the Dutch succeeded in inducing the French to enter into a Treaty of identical import with the Treaties which they had previously concluded with Spain and with Portugal. England had meanwhile entered into similar engagements with Portugal in 1654[36], and she conceded the same privilege to the Dutch in 1667, as the price of an alliance between the States General and England against France. This privilege was renewed in the following year at Breda, and again in the Treaty of Commerce concluded at London in 1674[37], and the relations between Holland and England continued to be so far exceptional to the Common Law of the Sea down to 1756, when on the refusal of the States General to fulfil certain stipulations of the Treaty of 1678, England declared that she would not recognise any longer this treaty privilege in favour of the Dutch. In 1667[38] England admitted the principle of Free Ship, Free Goods, into a treaty concluded with Spain, and in 1677 into a treaty concluded with France. The same principle was also recognised in the Treaties of Utrecht (A.D. 1713) as between France and Great Britain, France and the United Provinces, Spain and Great Britain, Spain and the United Provinces. Denmark, Sweden, and Russia, had severally entered into special treaty-engagements with various Powers prior to the Armed Neutrality of 1780, which comprised amongst

Dutch Treaties.

British Treaties.

Treaties of Utrecht.

[36] Dumont, Tom. VI. Part II. p. 49.

[37] Ibid. Tom. VIII. Part I. p. 61.

[38] Annual Register, A.D. 1780, p. 84.

Armed Neutrality of 1780.

its principles that of Free Ship, Free Goods, but not the correlative principle of Enemy Ship, Enemy Goods. Prussia had, on the other hand, admitted both principles into a treaty concluded with Sweden in 1762, and she acceded to the Armed Neutrality on 8 May 1781. The Roman Emperor of the Germans had likewise admitted both principles into a treaty concluded with Spain in 1725[39]; and he entered into a treaty with Russia on 10 July 1781, which recognised the principle of Free Ship, Free Goods. The King of the Two Sicilies acceded to the Armed Neutrality on 10 Feb. 1783, but the action of the Northern Confederacy was suspended by the General Peace concluded in that year. The convenience of the principle that the neutral Flag covers the Cargo had thus been very generally recognised by the Nations of Europe prior to the war of the first French Revolution; since which event several of the European Powers have entered into treaty-engagements in affirmance of this principle, not merely with various European Powers, but with the United States of America, and with several independent States of the South American Continent. Meanwhile the rule of the Consolato del Mare has been held to constitute the Common law of the Sea, and Nations have acted upon it as such, when no treaty-engagements[40] have bound them to observe a contrary practice.

§ 82. It would appear from the above survey that there are three distinct systems of law in regard to the exercise of Belligerent Right upon the High Seas, which have found favour from time to time with

39 Dumont, Tom. VIII. Part II. p. 115.

40 A very complete review of the Treaties on the principle of Free Ship, Free Goods, will be found in Manning's Commentaries on the Law of Nations, pp. 224–280.

particular Nations, and which are departures from the system of the middle ages, or as it may be conveniently termed, the Rule of the Consolato del Mare. The latter system may be justly said to rest upon principles of Natural Right, and has commended itself to general acceptation as being in conformity with the great maxim of all justice, "suum cuique[41]." The *formula* which expresses it, may be thus stated :— Four systems of Maritime Law.

Enemy Ship, Enemy or Neutral Goods.
Neutral Ship, Neutral or Enemy Goods.

In other words, there is no implied connection between the character of the ship and the character of the cargo ; and the immunity of neutral property from capture, whether it be the ship itself, or the cargo laden in the ship, is consistent with the confiscation of enemy's property. The belligerent's right of prize under this system is restricted to the property of his enemy ; and whilst his enemy's property in any form on the High Seas is good prize, neutral property in any form is entitled to pass free. The Consolato del Mare.

§ 83. The first systematic departure from the Rule of the Consolato del Mare was made by France. The Ordinance of Charles II (17 December 1400)[42], which is the earliest extant French Ordinance, had forbidden the Admiral to condemn any ship or merchandise which did not belong to an enemy; and a similar injunction is found in the Règlement of 1517 ;[43] but the Règlement of Francis I (A. D. 1543)[44] declared a neutral ship carrying enemy's goods, and neutral goods found on board an enemy's ship, to be good prize. This Règlement proceeds upon the principle The French System.

41 Heffter, § 162.
42 Lebeau, Code des Prises, Tom. I. p. 1.
43 Ibid. p. 5.
44 Lebeau, Tom. I. p. 9.

of enemy's property infecting neutral property; and the *formula* expressing it may be thus stated :—

Enemy Ship, Enemy Goods.
Enemy Goods, Enemy Ship.

The same principle is affirmed by the Edict of Henry III. (A. D. 1584)[45]. Sir Leoline Jenkins, writing in 1668[46], seems to doubt whether these Ordinances were ever acted upon in the French Courts of Prize, "the design of the first publishing of them being," in his opinion, "only *in terrorem* for the purpose of putting an end to neutral frauds in concealing enemy's interests." There is no doubt, however, that this principle was embodied in the Famous Ordonnance de la Marine of Louis XIV (A.D. 1681)[47], which formed the Rule of the French Admiralty Courts down to 1744, and that those Courts only allowed of any relaxation in this rule in cases where France had entered into particular treaty-engagements of an exceptional character.

The Dutch System.

§ 84. The second systematic departure from the Rule of the Consolato del Mare was brought about by the Dutch in the interest of the Neutral Shipowner, but at the expense of the Neutral Merchant. It proceeds upon the principle that the ship and her cargo are not severable in interest, and that the hostile or neutral character of the ship shall alone be regarded in determining the question as to the cargo being prize or no prize. The *formula* expressing this rule may be stated as follows :—

Free Ship, Free Goods.
Enemy Ship, Enemy Goods.

According to this rule the goods of a neutral found on board the ship of an enemy are good prize, whilst

45 Lebeau, Tom. I. p. 19.
46 Life of Sir Leoline Jenkins, Vol. III. p. 720.
47 Lebeau, Tom. I. p. 80.

the goods of an enemy found on board the vessel of a neutral are exempt from confiscation. Grotius, in commenting on the maxim of "Enemy Ship, Enemy Goods," most appositely remarks, that "in order that a thing may become ours by the Right of War, it is requisite that it should have belonged to the Enemy. The things which are in the hands of our enemy, as for example in his towns, or under his protection, but of which the owners are neither the subjects of our enemy, nor actuated by hostile intentions towards us, cannot be acquired by war[48]." He further goes on to say, "wherefore what is said, that goods found in enemy's ships are to be regarded as enemy's property, ought not to be accepted as a settled rule of the Law of Nations, but as raising a certain presumption, which may be rebutted by valid proofs to the contrary; and so it was of olden time adjudged by a full Senate, when war was raging with the Hanse Towns in 1338, and that judgment has become Law[49]."

§ 85. The third systematic departure from the Rule of the Consolato del Mare has been made with the general consent of all the European Powers, with the exception of Spain. It proceeds upon the principle which was affirmed by the Armed Neutrality of the Baltic Powers in 1780[50], when it declared, that "the property of the subjects of Belligerent Powers should be free, if found on board of neutral vessels, with the exception of contraband of war;" but it leaves untouched the immunity, which neutral merchandise enjoys under the Common Law of Nations, although it be found on board of an enemy's vessel. The Declaration of Maritime Law made by

48 De Jure Belli et Pacis, L. III. c. 6. Tit. 5.

49 Ibid. Tit. 6.

50 Martens, Récueil, T. III. p. 158.

Declaration of Paris of 1856.

the Plenipotentiaries of the Seven Powers assembled in Congress at Paris on 16 April 1856[51], sanctions the principle, that the neutral flag covers the vessel and its cargo, although the latter may be enemy's property, provided that it be not contraband of war. "Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre." By this declaration the Seven Powers have bound themselves in regard to one another not to act upon the Rule of the Consolato del Mare, under which enemy's property is good prize, if found on board a neutral vessel. There is, however, nothing in this departure from the rule of the Common Law, which is contrary to Natural Right. The doctrine of "Free Ship, Free Goods," taken absolutely and disconnected from the correlative doctrine of "Enemy Ship, Enemy Goods," implies nothing more, than that the Belligerent has consented to waive the exercise of his Natural Right to take possession of the property of his enemy, if it should be found on board of a neutral ship. On the other hand the Declaration of the Congress of Paris has affirmed the Rule of the Consolato del Mare in regard to the immunity of neutral property found on board of an enemy's ship, provided it be not contraband of war. "La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi." The Declaration of Paris may therefore be regarded as a step in a perfectly safe direction, involving no vicious principle at variance with Natural Right. Mr. Wheaton[52] has well observed, antecedently to the Declaration of Paris, that the principle of "Free Ship, Free Goods," is perfectly reconcilable with the Rule of the Consolato del Mare as to neutral goods being

[51] Martens, N. R. Général, T. XV. p. 792.

[52] Elements of International Law, Pt. IV. c. 3. § 22.

free, although found on board of an enemy's ship. Speaking of the stipulation that neutral bottoms shall make neutral goods, he remarks that it is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive Law of Nations. On the other hand, the stipulation subjecting neutral property found in the vessel of an enemy to confiscation, as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the Law of Nations; but neither reason nor usage renders these two concessions so indissoluble, that the one cannot exist without the other[53]."

§ 86. It was recited in the Declaration of Paris[54] (16 April 1856) that the principles of Maritime Law, adopted by the parties to that Declaration, should

[53] Cf. the Nereide, 9 Cranch's Reports, p. 419.

[54] The Text of the Declaration is as follows. "Considering that maritime law in time of war has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents, which occasion serious difficulties and even conflicts;

That it is consequently advantageous to establish an uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect.

The above-mentioned plenipotentiaries (of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Congress at Paris April 16, 1856) being duly authorised, resolved to concert amongst themselves as to the means of attaining this object, and having come to an agreement, have adopted the following solemn declaration:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. Parliamentary Paper 1856.

not be obligatory upon any States which should not accede to that Declaration; and further, that the Governments of the States, which had joined in the Declaration, should bring it to the knowledge of the States, which had not taken part in the Congress of Paris, and invite them to accede to it. In consequence of such invitation all the European Powers, with the exception of Spain, have acceded to the four articles of the Declaration[55]. Amongst the States of the Western Hemisphere, the Argentine Confederation, Brazil, Chili, Ecuador, New Granada, Guatemala, Hayti, Peru, and Uruguay, have given in their adhesion to all the articles. Mexico, on the other hand, following the example of Spain, has announced her intention of adopting, as part of her own legislation, the principles embodied in the last three articles, but has declined to accede to the Declaration itself, on account of the first article, which declares Privateering to be abolished. The United States of America have in a similar manner declared

Mexico and Spain.

55 A list of those Powers, which had acceded up to 1858, will be found in Martens, N. R. Gén. Tom. XVI. p. 641. But a more complete list is set out in the instructions sent from the Foreign Office by Earl Russell to Lord Lyons at Washington on 18 May 1861, which were laid before the Congress of the United States in the month of November 1861, with the President's Message, and subsequently presented to both Houses of Parliament in 1862 as Papers, North America, No. 2, p. 111. The latter list is as follows: Baden, Bavaria, Belgium, Bremen, Brazil, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti, Hamburg, Hanover, the two Hesses, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, Holland, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, Wurtemberg, Anhalt-Dessau, Modena, New Granada, Uruguay. This is probably the same list, which was put forth by the French Government in a Memorandum from the Minister of Foreign Affairs, dated 12 June 1858.

their intention of observing the last three articles, but have declined to accede to the Declaration itself, unless the other Powers would agree to adopt an additional provision, to the effect "that the private property of the subjects or citizens of a belligerent on the High Seas shall be exempted from seizure by the public armed vessels of the other belligerent, except it be contraband." The Confederate States of America, by a resolution of 13 August 1861, have declared their intention of governing their intercourse with the rest of mankind in conformity with the last three articles, whilst they have affirmed the principle, "that we maintain the right of Privateering as it has been long established by the practice, and recognised by the Law of Nations." The result is that the exercise of belligerent Right upon the High Seas on the part of those Powers, which are parties to the Declaration of Paris, is governed, as respects one another, by the principles affirmed in that Declaration, but as respects the United and the Confederate States of America, Spain, and Mexico, by the Common Law of Nations, unless there be any preexisting treaty-engagements with those Powers to the contrary. The plenipotentiaries of the Powers assembled in Congress at Paris on the day on which the Declaration was signed, placed on record in a Protocol[56] of that date

United States and Confederate States of America.

Protocol No. 24.

[56] Protocol No. 24. Sur la proposition de M. le Comte Walewski et reconnoissant qu'il est de l'intérêt commun de maintenir l'indivisibilité des quatre principes mentionnés à la Déclaration signée en ce jour, MM. les Plénipotentiaires conviennent que les Puissances qui l'ont signée, ou celles qui y auront accédé, ne pourront entrer à l'avenir sur l'application du droit maritime en temps de guerre, en aucun arrangement qui ne repose à la fois sur les quatre principes objet de la dite Déclaration. Sur une observation faite par MM. les Plénipotentiaires de la Russie, le Congrès reconnait que la présente résolution, ne pouvant avoir d'effet retro-actif, ne saurait invalider les Conventions antérieures. Martens, N. R. Gén. T. XV. p. 768.

their agreement, that neither the original parties to the Declaration, nor the Powers that should accede to it, can enter thereafter into any arrangement in regard to the application of Maritime Law in time of war, which does not at the same time rest upon the four principles which are the subject of the Declaration.

Territorial theory of Hübner.

§ 87. Hübner, in his work upon the seizure of neutral ships published in 1759, had advocated the adoption of the principle of Free Ship Free Goods, concurrently with the maintenance of the rule of the Consolato del Mare, that neutral merchandise should be exempt from capture although found on board an enemy's vessel. His argument in support of the former principle rested upon two propositions, that neutral ships are neutral territory[57] within which enemy's property is sacred, and that commerce ought to be as free to neutrals in time of war as in time of peace, seeing that neutrals are not parties to the contention. In the same spirit Klüber[58] and Martens[59] both rest the principle of Free Ship Free Goods upon the territoriality of merchant vessels on the high seas. The former writer says, "Upon the ocean, every ship is considered extra-territorial in regard to all foreign Nations. A merchant-vessel ought to be considered as a floating colony of its State. In consequence, no belligerent Power ought to allow itself to visit a neutral ship,

Klüber.

57 Or les Vaisseaux neutres sont sans contredit des lieux neutres; d'où il s'ensuit que quand ils seraient incontestablement chargés pour le compte de l'ennemi, les belligérans n'ont aucun droit de les inquiéter au sujet de leurs cargaisons, puisqu'il revient au même d'enlever des effets d'un navire neutre, ou de les enlever sur un territoire neutre." De la Saisie des Batimens neutres ou du Droit qu'ont les Nations belligérantes d'arrêter les navires des peuples neutres. La Haye, 1759.

58 Droit des Gens. Part II. Tit. I. c. 2. § 299.

59 Précis de Droit des Gens. L. VIII. c. 7. § 316.

nor to confiscate enemy's goods which are on board of it, much less to appropriate to itself the ship by reason of the cargo belonging to an enemy. It is this principle which is expressed by the maxim of law, *the neutral flag covers the cargo* (*die neutrale Flagge deckt die Warre*); in other words, the neutral vessel renders the cargo neutral. It is the same with goods laden on board an enemy's vessel, which a belligerent has not any more the right to confiscate, than if he found them on the continental territory of an enemy." Martens, with a like view, observes, "There is no doubt that a belligerent Power may confiscate enemy's ships with enemy's cargoes; but whilst war does not authorise hostilities in a neutral place, it would seem that the Law of Nature forbids us to capture enemy's goods of an innocent character, which are found on board of a neutral ship, and much more to confiscate the ship; and as war does not authorise us to appropriate the goods of the subjects of a State with which we are at peace, although found in an enemy's country, it is equally forbidden us to confiscate a neutral cargo found in an enemy's vessel; accordingly the law of Nature will suffice to establish the principle that *the flag protects the cargo* (*frey schiff frey gut*), but *never confiscates it* (*verfallenes schiff macht nicht verfallenes gut*). "It must be admitted," he goes on to say, "that an opinion contrary to the first of these principles, namely, that according to the Law of Nature regard should be had to the property of the cargo rather than to that of the ship, does not want specious arguments to support it, and that a simple theory will never suffice to make persons agree upon a point, in regard to which their interests are not the same." Of the above writers Klüber is the most logical in his

Doctrine of Martens.

conclusions, as he denies to a belligerent any Right of Visit and Search, which would be a necessary consequence of admitting a neutral ship to all the privileges of neutral territory. Martens, on the other hand, does not claim immunity under the law of Nature for enemy's cargo on board a neutral ship, except it be of an innocent character; but it must not be forgotten that the inviolability of neutral territory is something absolute, and is communicated to everything within it, whether it be suitable or not to belligerent purposes. Martens also admits the Right of Visit to be a Natural Right of belligerents, on the ground that the neutral merchant flag is not sufficient proof that the vessel is not an enemy vessel; but the Right of Visit on the part of a belligerent is inconsistent with the sacred character of neutral territory, more particularly as the object of the visit of a merchant ship by a belligerent is to examine the ship's papers, and to ascertain thereby whether the owners of the ship are friends or enemies, independently of the question whether the vessel lawfully sails under a neutral flag.

Bynkershoek.

§ 88. Bynkershoek had anticipated the territorial theory of Hübner in discussing the right of a belligerent to take possession of enemy's goods on board of a neutral ship, and had shown its inconsistency with the belligerent Right of Visit. "Velim animadvertes eatenus licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis[60] in navi repertis constet navem amicam esse. Si id constet, dimittam, si hostilem esse constiterit, occupabo. Quod si liceat, ut omni jure licet, et perpetuo observatur, licebit quoque instrumenta, quæ ad merces pertinent, excutere, et inde discere, an quæ hostium bona in navi lateant, et

[60] Quæst. Juris Publici, L. I. c. 14.

si lateant, quidni ea jure belli occupem." Lampredi[61], writing subsequently to the appearance of Hübner's work, contravenes the fiction of a ship being part of the territory of a State, as altogether untenable. In effect, he says, it is not true to say that men who navigate the High Seas, that is who find themselves in a place which is not subject to the jurisdiction of any Nation, can be regarded as upon the territory of the Nation whose flag they carry, as Hübner has erroneously pretended. The flag, when it is accompanied by sea-papers, only serves to make known to what Nation the crew and the ship belong, that they have set out from a certain port with permission to navigate the Sea, and to hoist the flag which they carry. With regard to other persons who may be on board, they have no other laws to observe than those of natural justice and of the police established by the Sovereign Power of the Nation, as well for the maintenance of good order on board, as for the conduct to be observed in regard to vessels which they may meet with upon the Sea. Two vessels which meet under such like circumstances, resemble two carriages which happen to meet in a desert place, which is not in the occupation of any Nation. It would be very absurd for the owner of one of them to pretend that his carriage is the territory of his State, because he has hoisted upon it the flag of his State. The pretension of a marine carriage (voiture de mer) is not less ridiculous, when, having hoisted the flag of a Nation, the owner of the carriage claims that it should be regarded as forming part of the Nation's territory, and as such should be inviolable. The persons of the individuals, who are on board of a vessel

Lampredi.

[61] Du Commerce des Neutres, en temps de Guerre, traduit par J. Peuchet, Paris, an. X. (1862), p. 139. Part. I. § 10.

on the High Seas deserve to be respected beyond doubt, and they ought not to be troubled or arrested, not because they are upon a territory, but by reason of Natural Right, which constitutes them free and independent of every other person but their lawful Sovereign. Although it may be perfectly true that violence and injustice exercised on the High Seas against the subjects of a State ought to lead, and does in fact lead, their Sovereign to demand redress even by force of arms, he does not however do so because his territory is violated, but from the general obligation under which he is placed to defend his Subjects from all violence, in whatever place they may be, and to obtain reparation for any damage which they may have suffered."

§ 89. The principle of territoriality has been ably discussed by an English writer. "It remains," says Mr. Manning, "to consider one more position, which has been much relied on by writers, who have claimed that the flag of a neutral shall protect the goods of a belligerent. The argument is based on the fact, that a belligerent has no right to capture the property of his enemy, when in the territory of a neutral. It is asserted that a ship is part of the territory of the State, to which she belongs; and that goods on board a neutral ship are therefore as exempt from capture as if they were actually in the neutral country itself.

Manning.

"To argue that a neutral ship is neutral territory is a fiction so palpable, that it appears surprising that it should ever have been insisted on as a tenable position, especially as only one argument is adduced in support of this *territoriality* of ships at sea. The jurisdiction of the State to which a ship belongs extends to the cognisance of acts committed in that ship at sea; and it is argued that this continuance

of jurisdiction proves that a ship at sea is part of the territory to which she belongs. This deduction seems, in the first place, farfetched and too flimsy to be made the basis of any serious conclusion. But more than this, it meets with contradictions on its own terms. A ship, say the assertors of this proposition, is part of the State to which she belongs, as is evident, because at sea she is subject to its jurisdiction. Now no Nation has jurisdiction over the territory of another Nation. But as soon as a merchant ship comes into the harbour of a State to which she does not belong, she becomes subject to the jurisdiction of this latter State. This shows that a merchant ship cannot be considered as part of the territory of a State; for if she possesses this character at any time, she must possess it at all times. The fact of a ship at sea being subject to the jurisdiction of the State, under whose flag she sails, is a most reasonable and advantageous regulation: if not amenable to the jurisdiction of their own State, to whom would the crews of ships at sea be answerable? and if they were amenable to no tribunal, the sea would be a place where every crime might be committed with impunity. But it is difficult to imagine how it can be deduced as a consequence from this, that a ship is part of the territory of her State. The fiction is completely destroyed by the disproof above alleged, but other reasons combine to show how little tenable is this position. If a ship be part of the territory of the State of which her owners are citizens, it cannot be allowed to take from her Contraband of war going to an enemy, because such capture would not be permitted, if the Contraband goods were lying in neutral territory. Again, if neutral ships carry the soldiers of our enemy, it would not be

allowable to make them prisoners, because we must not attack the territory of a neutral. Either the argument is worth nothing at all, or it holds to this extent, which is a *reductio ad absurdum*. To escape contradiction, the Right of Search and of seizing contraband goods must be denied, if the right to protect enemy's goods be claimed on this ground[62]." Mr. Manning might have gone even further in tracing out the necessary consequences of the territorial theory, and have added that the right of blockade must also be denied, if neutral ships partake of the inviolable character of neutral territory.

The Passport or Sea-Letter.

§ 90. If we look to the origin of the Mercantile Flag, it would appear to be a regulation of the municipal Law of individual States, and not to be an institution of the general Maritime Law. The Passport or the Sea-Letter, as the case may be, is the formal voucher of the ship's National Character. The Passport purports to be a Requisition on the part of the Government of a State to suffer the vessel to pass freely with her company, passengers, goods, and merchandise, without any hinderance, seizure, or molestation, as being owned by citizens or subjects of such State[63].

62 Manning's Commentaries on the Law of Nations, c. vi. § 1. p. 209.

63 The best account of the Passport is given by D'Abreu (Part I. c. 2), who justly observes that it covers sometimes the cargo as well as the ship, but that it invariably names the ship, its build, the captain, and his residence. D'Abreu also gives an account of the Sea-Letter, which he describes as being in the same form as the Pass. The difference between them would seem to consist in this, that whilst the Pass is issued in the name of a Sovereign Power or State, the Sea Letter is issued in the name of the Civil Authorities of the port, from which the vessel is fitted out. The form of a Sea Letter is annexed to the Treaty of the Pyrenees (A. D. 1659), under which it was provided that Free Ships should make Free Goods. It is termed "Literæ Salvi Conductus," and the force and effect of it is thus described in the XVIIth Article of the Treaty itself: "Ex quibus non solum de suis mercibus impositis, sed etiam de loco domicilii et habitationis, ut et de nomine tam

"The first paper," says Sir W. Scott, "which we usually look for, as proof of property, is the Pass[64]." The same learned Judge elsewhere observes[65], "It is a known and well established rule with respect to a vessel, that if she is navigating under the Pass of a foreign country, she is considered as bearing the national character of that Nation under whose Pass she sails. She makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country." The Pass or Sea-Letter was, until very recent times, indispensable for the security of a neutral ship from molestation by belligerent cruisers, and it was the only paper to which any respect was paid by the Corsairs of the Barbary States, as warranting the vessel to be within the protection of their respective treaty-engagements with the European Powers[66]. If a vessel be furnished with a Pass or Sea-Letter, it is immaterial whether she has any Mercantile Flag on board or not. The latter by itself is not a criterion of the national character of the owners of the vessel. By an early Statute of the City of Lubeck[67] (A. D. 1299),

Domini et Magistri navis, quam navigii ipsius constare queat: quo per duo hæcce media cognoscatur, an merces vehant de *Contrebande*, et sufficienter tam de qualitate, quam de Domino et Magistro dicti navigii constet. His literis salvi conductus et certificationibus plena fides habebitur." In the Treaty of Copenhagen concluded 11 July 1670, between Great Britain and Denmark, the Sea-Letter is termed a Certificate; and it is provided that the ships of either Confederate shall carry Letters of Passport and a Certificate, of which the forms are set forth in the body of the treaty. This Sea Letter or Certificate extended to the cargo.

[64] The Hoop, 1 Ch. Rob. p. 130.

[65] The Vigilantia, 1 Ch. Rob. p. 13.

[66] An account of the Mediterranean Passes will be found in Reeves's History of the Law of Shipping, Pt. III. p. 423.

[67] Pardessus, Lois Maritimes, Tom. III. p. 411. Tout patron, bourgeois de Lubeck, sera tenu d'arborer le pavillon Lubeckois, sous peine d'une amende de trois marcs d'argents au profit de MM. les sénateurs et de la ville de

every citizen of Lubeck, who was master (patron) of a ship, was bound to hoist the flag of Lubeck, under pain of a fine of three marks of silver for the benefit of the Senators and the City of Lubeck. A similar regulation had been made by the City of Hamburg (*mutatis mutandis*) with regard to masters of vessels, who were citizens of Hamburg. (A.D. 1270.) On the other hand, by a Statute of the City of Marseilles, of still earlier date, between 1253 and 1255, we find it provided that every ship belonging to men of Marseilles shall be bound to hoist on the ship the flag of the community of Marseilles with a cross extended aloft; and that no citizens of Marseilles who are owners (domini) of ships may or ought to hoist on their ships, within the port of Marseilles or elsewhere, any arms or any flag of another civic community, but only the flag of the community of Marseilles, except in the land of Syria, in which those citizens of Marseilles, who have special privileges in that country distinct from the other citizens, may hoist another flag on their ships, provided also that they likewise hoist always the flag of the community of Marseilles[68]. It would thus appear that the Mercantile Flag was originally of ambiguous import, inasmuch as it might denote either the National character of the master or patron[69] of the ship, or the National character of the owner of the ship; but that the Pass or Sea-Letter was always a criterion of ownership, that is, whether the ship

Lubeck, à moins qu'il n'en soit empêché par des obstacles de force majeure, ou par des dangers aux quels sa personne ou son navire seroient exposés.

[68] Pardessus, Lois Maritimes, Tom. IV. p. 272.

[69] Emérigon, in his Treatise on Insurances, c. 7. § 5. says, "They also call *captain* him who commands a merchant vessel intended for a long voyage; but persons commanding trading barques, or merchant vessels not making long voyages, are entitled on the ocean *masters*, and in the Mediterranean *patrons*."

was the property of an enemy or friend. Hence Bynkershoek justifies the Right of a belligerent cruiser to visit a neutral ship, in order that it may be established from the ship's papers, as distinguished from her flag, that she is neutral property. But the legal incidents of ownership, as regards a ship, are quite irreconcilable with the theory of a ship being the territory of the Nation, whose flag she carries. By the general Maritime Law a ship is capable of being owned in shares, and there is nothing in the Law Maritime which precludes a ship from being owned in shares by citizens of different States. Again, although it may be sometimes the policy of a State to exclude foreigners altogether from the right of owning any part of a vessel entitled by the municipal law of that State to hoist its Mercantile Flag, still that is not the invariable rule, and the actionaries or part-owners of a merchant ship are in some cases permitted by the municipal law of a State to be citizens of different countries. In such a case, however, a belligerent cruiser is entitled to look at the Pass or Sea-Letter of the ship, and Courts of Prize have held the ship to be bound by the character imposed upon it by the authority of the Government, from which the Pass or Sea-Letter has issued[70].

§ 91. In the sight of a belligerent a merchant vessel is regarded simply as a vehicle conveying goods over sea to or from a market. Accordingly, under the Common Law of Nations, if the vehicle and goods should happen to be enemy's property, the belligerent takes possession of them *jure belli;* if on the other hand the ship should belong to a friend, and the cargo should be enemy's property, the belligerent relieves the carrier of his charge,

[70] The Vreede Scholtys, cited in a note to the Vrow Elizabeth. 5 Ch. Rob. p. 5.

indemnifying him at the same time for the carriage of the goods. If again the ship should belong to an enemy, and the cargo should be neutral property, the belligerent takes possession of the ship, whilst he restores the cargo to the neutral merchant. Further, both the ship and cargo may be the property of neutrals, whilst their destination is the port of an enemy; in which case a belligerent has a right to prohibit the conveyance of the goods to their destination, if their safe arrival is likely to be prejudicial to his success, and under certain circumstances he is entitled to seize and confiscate them. On the other hand, a neutral merchant is entitled to transport his merchandise over sea to a neutral port, in time of war, free from any interference on the part of a belligerent, beyond that, which may be necessary to assure the belligerent of the innocent character of the voyage. For the purpose, however, of such assurance, a belligerent has a right to visit a merchant vessel on the High Seas, with the object of ascertaining who may be its owner and what may be its destination, and of searching it with the object of ascertaining the nature and ownership of its cargo. "The Right of visiting and searching merchant ships on the High Seas," observes Lord Stowell, in the well known case of the Swedish Convoy, "whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable Right of the lawfully commissioned ship of a belligerent Nation; because till they are visited and searched it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this Right of Visitation and Search exists. This Right is so clear in principle, that no man can deny it who admits the Right of

Right of Visitation and Search.

maritime capture, because if you are not at liberty to ascertain by sufficient enquiry whether there is property which can be legally captured, it is impossible to capture. Even those who contend for this inadmissible rule, that free ships make free goods, must admit the exercise of this right at least, for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for the practice is uniform and universal upon the subject[73]." "We cannot prevent the carriage of contraband goods," says Vattel[74], "without searching neutral vessels that we meet at sea; we have, therefore, a right to search them. "In order to enforce the rights of belligerent Nations against the delinquencies of neutrals, and to ascertain the real as well as the assumed character of all vessels on the High Seas, the Law of Nations arms them with the practical power of visitation and search." Such is the language of Mr. Chancellor Kent[75], who goes on to say, "Neutral Nations have frequently been disposed to question and resist the exercise of this Right. This was particularly the case with the Baltic Confederacy during the American war, and with the Convention of the Baltic Powers in 1801. The Right of Search was denied, and the flag of the State was declared to be a substitute for all documentary and other proof, and to exclude all right of search. Those Powers armed for the purpose of defending their neutral pretensions; and England did not hesitate to consider it as an attempt to introduce, by force, a new code of maritime law, inconsistent with her belligerent rights and hostile to her interests, and one

The Swedish Convoy.

Vattel.

Chancellor Kent.

Convention of the Baltic Powers.

73 The Maria, 1 Robinson, p. 36.
74 Droit des Gens, L. III. c. 7. § 114. Martens, Précis, L. VIII. c. 7. § 321.
75 Commentaries on American Law, Tom. I. p. 153.

which would go to extinguish the right of maritime capture. The attempt was speedily frustrated and abandoned, and the Right of Search has, since that time, been considered incontrovertible." Mr. Wheaton[76] coincides in this opinion, when he says the Right of Visitation and Search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. Even if the right of capturing enemy's property at sea be ever so strictly limited, and the rule of *free ship free goods* be adopted, the Right of Visitation and Search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to the Law of Nations and Treaties; for, as Bynkershoek[77] observes, "it is lawful to detain a neutral vessel in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral." Indeed, it seems that the practice of maritime captures could not exist without it. Accordingly the text writers generally concur in recognising the existence of this Right[78].

Wheaton.

Right of Approach.

§ 92. The Right of Approach on the High Seas, in time of war, may be distinguished from the Right of Visitation and Search. Upon the general question of the Right of Approach on the High Seas, it may be justly said that no vessel has any exclusive Right to the use of the ocean beyond that extent of it which the vessel physically occupies, and which is essential for her movements. Merchant ships, accordingly, are in the habit of approaching one an-

[76] Elements, Pt. IV. c. 3. § 29.

[77] Quæstiones Jur. Publ. L. I. c. 14.

[78] Martens, Précis, L. VIII. c. 7. § 317 and 321. Lampredi, Du Commerce des Neutres, § 12.

other within such limits as are consistent with the safety of navigation, either with a view to ascertain the name and character of strangers, or to procure information or assistance. With respect to ships of war sailing under the authority of their Government to maintain the general police of the High Seas and to arrest pirates and other public offenders, there is no reason why they may not approach any vessel descried at sea for the purpose of ascertaining its real character. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those whom they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is under such circumstances bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her own voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but at the same time she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either in regard to delay or in regard to the progress and course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to be the natural result of the common duties and rights of Nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it[79].

§ 93. It is obvious that the Right of Approach

79 The Mariana Flora, 11 Wheaton, p. 43.

in time of war will be subject to different considerations from those which govern that Right in time of peace. As resistance on the part of a neutral vessel to the Right of Visitation and Search, when sought to be exercised by a lawfully commissioned belligerent cruiser, entails, as a penalty, the condemnation of the ship and cargo by a Court of Prize, it is due to the owners of the neutral vessel and her cargo, that the belligerent cruiser shall so conduct herself, as to leave no doubt in the mind of the master and crew of the neutral vessel of the lawful character of the cruiser, when she approaches for the purpose of visiting the neutral vessel. With this object the regulation of the exercise of the Right of Visitation and Search has been frequently the subject of treaty-engagements between the European Powers. Lampredi has observed, that as it is an usage of long standing for captains of vessels, whether merchant or armed vessels, to hoist any flag which they think most suitable with the object of deceiving or surprising other vessels and approaching sufficiently near to prevent their escape, the master of a neutral merchant ship cannot with reason be required to stop the course of his vessel upon the mere display of a belligerent flag on board another vessel, inasmuch as he might thereby expose his vessel to be captured by a pirate. Accordingly the neutral master has a right to be assured of the just claim of an armed vessel to visit his ship and cargo, before he can be liable to any penalty for attempting to escape[80]. On the other hand, it is an universally received maxim that whoever claims to exercise a right against any person, must commence by proving that he is entitled to the right. There being then two rights at issue, neither of which can be safely abandoned without on the

Regulation of Right of Visitation and Search.

[80] San Juan Baptista, 5 Ch. Rob p. 34.

one hand impairing too much the efficient action of a belligerent cruiser, and on the other hand endangering too much the safety of the neutral merchant vessel, it has been from time to time the object of various European Powers to come to an understanding with one another as to the forms under which the Right of Visitation and Search should be exercised by belligerent cruisers, so as to relieve, as far as the nature of the subject would allow, the masters of neutral ships from all peril in obeying the summons of a belligerent cruiser. Lampredi[81] considers that it is no longer a matter of mere Conventional law, but may be regarded as an established usage, that the flag of a belligerent cruiser must immediately after it has been hoisted, as a signal for a merchant vessel to shorten sail, be affirmed by a gun fired with blank cartridge, and further that the cruiser must at such time not approach the merchant vessel so close as to cause the latter to apprehend any but peaceful intentions on its part. Upon the merchant vessel shortening sail, the cruiser is entitled to send a boat's crew on board of her to examine her papers, and if necessary to search her cargo, and the master of the merchant vessel is bound to submit all his papers to examination, and to permit his cargo to be overhauled. Mr. Justice Story is disposed not to admit that there exists any universal rule or obligation of an affirming gun. "It may be," he observes, "the law of the maritime states of the European continent, founded in their own usages or positive regulations. But it does not hence follow that it is binding on all other Nations[82]." General Halleck, in his work on International Law, published since the outbreak of war amongst the North American States, observes,

Rule of an affirming gun.

Mr. Justice Story.

General Halleck.

[81] Du Commerce des Neutres, § 12.

[82] The Mariana Flora, 1 Wheaton, p. 50.

that "the usual mode, adopted by most of the Maritime Powers of Europe, of summoning a neutral to undergo Visitation, is the firing of a cannon on the part of the belligerent. This is called by the French *semonce, coup d'assurance*, and by the English *affirming gun*. It is undoubtedly the duty of the neutral to obey such a summons, but there is no positive obligation on the belligerent to fire such *an affirming gun;* for its use is by no means universal. Moreover any other method, as hailing by signals, &c. of summoning a neutral to submit to an examination, may be equally as effective and binding as the *affirming gun*, if the summons is actually communicated to and understood by the neutral. The means used are not essential, but the fact of a summons actually communicated is necessary to acquit the visiting vessel of all damages, which may result to the neutral disobeying it[83]." On the other hand, Sir R. Phillimore seems to consider that the received mode of summoning the neutral to undergo Visitation is by the firing of a cannon shot on the part of the belligerent, and that it is the *distance* at which this shot shall be fired, which has been the subject of particular conventions[84]. M. Heffter[85] observes that the exercise of the Right of Visitation has been more especially regulated by the Treaty of the Pyrenees[86], of which the dispositions in this matter have become in some manner the Maritime Law of Europe. Upon a careful review of the practice of the European Powers in modern times, it would appear that no neutral merchant ship is bound to shorten sail, unless the belligerent cruiser

Sir Robert Phillimore.

Heffter.

[83] Chap. XXV. On Visitation and Search, § 15.

[84] Commentaries, Vol. III. § 332.

[85] Das Europäische Völkerrecht, § 169.

[86] Dumont, Tom. VI. Part ii. p. 264. Schmauss, Corp. Jur. Gent. p. 683.

fires a gun to warn her of her intention to visit her. Whether the gun shall be fired before the cruiser displays her flag, or immediately after she has shown her colours, may be immaterial. The two conditions which ought to be fulfilled by the belligerent cruiser, in justice to the master of the neutral merchant vessel, before the latter can be held to act in contravention of any belligerent right, are that the true character of the cruiser herself shall be made known to him by the exhibition of her military flag, and that her intention to visit the merchant vessel in virtue of her belligerent right shall be notified to him by the firing of a gun. If the neutral ship should have sailed prior to hostilities, and her master and crew should be in perfect ignorance of the existence of war, and consequently unconscious that they have any neutral duties to perform, a mere attempt to escape on their part from an armed ship, which proves herself afterwards to be a belligerent cruiser, will not be a breach of neutral obligation[87].

Treaty of the Pyrenees.

§ 94. By Article XVII of the Treaty of the Pyrenees (7 Nov. 1659), which is considered to embody the common Law of Nations on the subject, the object of the Right of Visit is explained to be the inspection of the ship's Pass or Sea Letter, whereby the nature of her cargo, and likewise the domicil and residence and names of her master and her owner, as well as of the vessel herself, may be ascertained. The practice of Nations in regard to a ship's Pass has undergone some modification. Where treaties exist in regard to the exhibition of a Pass or Sea Letter, such ships only as are furnished with the specified Pass or Sea Letter are entitled to the treaty-privileges, whatever they may be. In other cases the Pass is not in the present day an indispensable document, if

Ship's papers.

[87] San Juan Baptista, 5 Ch. Rob. p. 35.

there are other papers on board, which satisfactorily establish the character, property, and destination of the ship and cargo. Amongst them the most important is the Builder's Contract, or the Bill of Sale in case the ship has ever changed owners; and in addition the Certificate of Registry, if the municipal law of the port, from which the ship hails, requires that she should be registered. If these two papers are on board and their *bona fides* is not impeached, the proof of the property as regards the ship will be sufficiently complete, so far as documentary evidence is concerned. With regard to the cargo, if the ship is a general ship, her Manifest and the Bills of Lading are the best evidence of both the ownership and the destination of the cargo. If on the other hand the vessel should be chartered, the Charter-Party should also be on board; but the absence of the Charter-Party will not justify the condemnation of the ship, any more than the absence of the Invoice of the goods; but the non-production of any Ship's paper, which is in strict law documentary evidence in regard either to the ship herself or to the cargo, will justify the sending the vessel into port for enquiry[88], in order that the master may account satisfactorily before a Court of Prize for the absence of the missing document.

Builder's contract or Bill of Sale.

Cargo-papers.

Charter-party.

Right of Detention.

§ 95. The Right of Detention for enquiry is a corollary to the Right of Visitation and Search. If the commander of a belligerent ship of war, having examined the papers found on board a merchant

[88] D'Abreu specifies nine papers which should be on board a ship in order that her papers should be regular. 1. Le Passport. 2. Les Lettres de Mer. 3. Le Journal. 4. Le Certificat de Santé. 5. L'Appartenance ou Propriété de Navire. 6. L'Inventaire des Marchandises. 7. La Charte-partie. 8. Les Connoissemens. 9. La Facture. He does not include La Rôle d'Equipage amongst the requisite papers, which Klüber however enumerates. Cf. Klüber, Droit des Gens, § 294.

vessel, shall perceive just and sufficient reasons for detaining her in order to proceed to a further examination, he may order a prize crew to go on board of her and conduct her to the nearest and most convenient port belonging to his Nation, subject to a full responsibility in costs and damages, if this should have been done without just and sufficient cause in the opinion of a duly constituted Court of Prize. "It is a rule of law," says Lord Stowell, "that the neutral vessel shall submit to the enquiry proposed, looking with confidence to those tribunals, whose noblest office (and I hope not the least acceptable) is to relieve by compensation inconveniences of this kind, if they have happened through accident or error, and to redress by compensation and punishment injuries that have been committed by design[89]."

§ 96. Every belligerent Cruiser has a right to insist on verifying the neutral character of every ship which it meets with on the High Seas, and which carries a neutral flag; and it is a clear maxim of law, that "a neutral vessel is bound in relation to her commerce to submit to the belligerent Right of Search." A neutral merchant accordingly cannot adopt any measures, of which the direct object is to withdraw his commerce on the High Seas from the free exercise of the Right of Search on the part of any belligerent cruiser. It is not competent therefore for a neutral merchant to exempt his vessel from the belligerent Right of Search by placing it under the Convoy of a neutral or enemy man-of-war[90]. "The very fact of sailing under the protection of a belligerent or neutral convoy," says Mr. Chancellor Kent[91], "is a violation of neutrality." Mr. Wheaton to a

Neutral may not sail under convoy.

Chancellor Kent.

89 The Maria, 1 Ch. Rob. 374.

90 Mr. Justice Story in the Nereide, 9 Cranch, p. 438.

91 Commentaries, Tom. I. p. 154.

similar effect, in discussing the Danish captures under the ordinance of 1810, asks, "Why was it that navigating under the convoy of a neutral ship of war was deemed a conclusive cause of condemnation? Wheaton. It was because it tended to impede and defeat the belligerent Right of Search; to render every attempt to exercise this lawful Right a contest of violence; to disturb the peace of the world, and to withdraw from the proper Forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction[92]." Actual resistance on the part of the convoying man-of-war is not necessary to establish the unneutral character of the act of a merchant vessel sailing under its protection. Lord Stowell in commenting on the suggestion that the intention to resist the Right of Search was never carried into effect by a neutral vessel which had sailed under convoy of a man-of-war, observes that "the intention is unchangeable, and being so, I do not see the person who could fairly contradict me, if I were to assert that the delivery and acceptance of such instructions and the sailing under them were sufficient to complete the act of hostility[93]."

§ 97. It is not by the Common Law of Nations a ground for confiscating the goods of a neutral merchant, that they have been shipped on board an enemy merchant vessel, even if the master of the enemy vessel should resist the exercise of the Right of Search on the part of a belligerent cruiser. The forcible resistance of the master of an enemy merchant vessel is nothing more than the hostile act of a person who is entitled to commit acts of hostility; and there is nothing *per se* unneutral in the conduct of the merchant who has embarked his goods on board of an unarmed vessel,

92 Elements of International Law, Part IV. c. 3. p. 597.

93 The Maria, 1 Ch. Rob. p. 376.

which is enemy's property. It is a proceeding which is more likely to be attended with inconvenience to the merchant, than if he had embarked his goods on board a neutral vessel, inasmuch as the enemy vessel is liable to be captured by the belligerent, in which case the merchandise may undergo a change of destination, and fail to reach its intended market. That circumstance however is for the consideration of the neutral merchant, who cannot be presumed to contemplate resistance. "If a neutral master," says Sir William Scott[94], "attempts a rescue, he violates a duty which is imposed upon him by the Law of Nations, to submit to come in for enquiry, as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner[95], and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the Rights of War[96]. With an enemy-master the case is very different. No duty is violated by such an act on his part,—*lupum auribus teneo*,—and if he can withdraw himself he has a right to do so." On the other hand, if a neutral merchant should ship his goods on board an armed ship belonging to the enemy, Lord Stowell has held that such an act betrays an intention on the part of the merchant to withdraw his goods from visitation and search, for it is a *presumptio juris et de jure* that an armed ship will resist visitation and search. If a merchant accordingly has placed his goods under the protection of a belligerent force, he must be taken to intend to receive the protection of

British Prize Courts.

Neutral merchandise in an armed ship of the enemy.

94 The Catherina Elizabeth, 5 Ch. Rob. p. 232.

95 The Despatch, 3 Ch. Rob. p. 278.

96 The Washington, 2 Acton, p. 30. n. The Franklin, 2 Acton, p. 109. The Short Staple *v.* the United States, 9 Cranch, p. 55.

it in such manner and under such circumstances as the belligerent may choose to apply it[97]; in other words, he abandons the protection of Neutrality, and must for the time be regarded as adhering to the Enemy.

Prize Courts of the United States.

The Supreme Court of the United States has held that there is no valid distinction of Right between the act of a neutral merchant who loads his goods on board an enemy merchant ship, and the act of a neutral merchant who ships his goods in an armed vessel belonging to the Enemy. The opinion of Chief-Justice Marshall, who with the majority of the Court decided in the case of the Nereide[98], "that a neutral merchant had a right to charter and lade his goods on board a belligerent armed vessel without forfeiting his neutral character," is entitled to great weight, not merely from the authority which attaches to the opinions of that eminent Judge, but also from the solidity of the reasoning upon which his judgment in that case proceeded. But the opinion of Mr. Justice Story was the other way, and coincided with the view of Lord Stowell. The Supreme Court of the United States, in February Term 1818, maintained the same view in the case of the Atalanta[99] as it had previously maintained in the Nereide; so that the decisions of the highest tribunal in the United States is on this point in direct conflict with the judgment of the English High Court of Admiralty.

97 The Fanny, 1 Dodson, p. 443.

98 9 Cranch, p. 388. This decision took place in February Term, 1815, and was nearly contemporaneous with Lord Stowell's judgment in the Fanny.

99 3 Wheaton, p. 241.

CHAPTER VI.

ON BLOCKADE.

Ancient practice of prohibiting all trade with the enemy—Object of a blockade—Penalties for the violation of a blockade—Regulated exercise of the Right of blockade—Legal requirements of a binding blockade—Declaration of the Congress of Paris—Characteristics of an effective blockade—Knowledge on the part of the Master of a vessel—Constructive Warning—Public Notification—General Notoriety—Notification dispensing with actual warning must accord with the fact of a blockade—Practice of the French Prize Courts—Practice of the United States Prize Courts—Violation of a blockade—Equity of British Prize Courts—Favourable construction of Licenses—Breach of blockade by egress—Egress lawful in certain cases—Duration of *delictum* after egress—Effect of fraud in egress—Cargo not always condemned with the ship—Extent of coast which may be placed under blockade — Limited operation of a blockade—Effect of a blockade on Licenses—Effect of Licenses on a blockade.

Ancient practice of prohibiting all trade with the enemy.

§ 98. The practice of a belligerent Power prohibiting all trade with an Enemy is of very ancient date. We have records of such a practice as early as the commencement of the thirteenth century[1]. It seems to have been usual in that and the next following century for belligerent Powers on the outbreak of war to issue proclamations, warning all persons not to attempt to import victuals or other merchandise

[1] Proclamation of Henry III. anno 1223. Rymer's Fœdera, Tom. I. p. 440. Robinson's Collectanea Maritima, p. 158.

into the Enemy's territory, and thereupon to arrest and confiscate the vessels and merchandise of any who might contravene such warning, as the property of parties adhering to the Enemy[2].

The States General of Holland appear to have maintained this practice without any dispute on the part of other Nations as late as the latter part of the sixteenth century; but it came to be questioned towards the end of the seventeenth century as an immoderate exercise of belligerent Right, since which time it has been generally reprobated and disclaimed, and may now be regarded as fallen into desuetude. On the other hand, the practice of intercepting all merchant vessels trading with the Enemy's ports by means of armed vessels cruising off the Enemy's coast is as ancient as war itself. Lord Stowell, who was always extremely reluctant to apply in its full rigour the European Law of Nations to subjects of the Ottoman Porte, considered the Law of Blockade to be an exception[3], on the ground that a blockade was one of the most universal and simple operations of war in all ages and countries, excepting such as were nearly savage. "It must not be understood by them," he says, "that if an European army or fleet is blockading a town or port, they are at liberty to trade with that port. If that could be maintained, it would render the operation of a blockade perfectly nugatory. They in common with all other Nations must be subject to this first and elementary principle of blockade, that persons are not to carry into the blockaded port supplies of any kind. It is not a new operation of war; it is almost as old and as general as war itself.

[2] Letter of Edward II of England to Philip V of France. Tanquam dictis inimicis adhærentes. Rymer's Fœdera, Tom. III. p. 880.

[3] The Kinders Kinder, 2 Ch. Rob. p. 89.

The subjects of the Barbary States could not be ignorant of the general rules applying to a blockaded place, so far as concerns the interests and duties of neutrals[4]."

Object of a blockade.

§ 99. The object of a blockade is to reduce the enemy to surrender by cutting off his supplies of every kind. War being a contention by force in the prosecution of Right, the primary object of war is to constrain the wrong-doing Nation to desist from doing wrong, and to make compensation for past injury. With this object, it is lawful for a belligerent to seize the property of an enemy as a pledge of redress for the past, and of good conduct for the future; and if the Enemy resist, to use force; and if it should be necessary in self defence, even to take away an enemy's life. The intercepting all supplies going to an enemy is a milder alternative, the immediate effect of such a measure being to constrain the Enemy to submit by the inconvenience to which the failure of his supplies will expose him. Blockade is thus a more lenient proceeding in the conduct of a war than actual assault. The latter involves the necessary sacrifice of human life, and by the destruction of property which it entails, may risk to destroy the means whereby compensation may be made by the Enemy for past injury. The former gives to the Enemy the option of being spared the effusion of human blood, whilst the belligerent at the same time refrains from destroying property. As between belligerent parties the establishment of a blockade is thus obviously not an improper use of superior force, and as the introduction of supplies by neutral merchants into a blockaded port must necessarily tend to frustrate the purpose of the belligerent party, which is to reduce

4 The Hurtige Hane, 3 Ch. Rob. p. 325.

the Enemy to terms by cutting off his supplies, it would be evidently to the prejudice of the just right of a belligerent that a merchant should attempt to introduce any supplies into a place which is blockaded. A belligerent Power will accordingly be entitled to prevent the introduction of any such supplies; and if a merchant persists after notice in attempting to introduce them, the belligerent may seize and confiscate them. "If the supplies sent," says Grotius, "hinder the execution of my design, and the sender might have known as much, as if I had besieged a town or blocked up a port, and thereupon I presently expect a surrender or a peace, that sender is obliged to make me satisfaction for the damage that I suffer on his account, as much as he that shall take a person out of custody that was committed for a just debt, or help him to make his escape, in order to cheat me; and proportionally to my loss I may seize his goods, and take them as my own, for recovering what he owes me[5]. Two conditions, it will be observed, are implied by Grotius in the case as thus stated, namely, actual measures on the part of the belligerent to stop all supplies being furnished to his enemy, and a knowledge of that fact on the part of the neutral merchant.

Penalties for the violation of a blockade.

§ 100. Blockade being thus a lawful means of constraining an enemy to submit to terms, and recourse to a blockade being sometimes necessary, when the enemy is by position inaccessible to direct assault, it follows that it is inconsistent with Neutrality for any third party to interfere with the operations of a

[5] Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio, aut pax expectabatur, tenebitur ille mihi de damno culpâ dato. De Jure Belli, L. III. c. 1. § v. 3.

blockade, and by introducing supplies into the blockaded place to hazard the defeat of the object, which the Belligerent Power has in view in resorting to such a measure. An attempt to relieve the necessities of an enemy, who is shut up in a place invested by a belligerent, is so clear an interference with the just operations of war, that the party so acting may with reason be treated as *pro hâc vice* adhering to the enemy. Grotius says, with special reference to the introduction of supplies into a blockaded place, that "if my enemy's injustice towards me be evident, the neutral who aids him in his unjust war will be guilty not only of a civil, but of a criminal offence, and may be punished accordingly[6]." Bynkershoek[7] says, that "to carry supplies to a besieged enemy has been always a capital offence in friends, equally as in subjects, after notice given to them, and sometimes even without notice; and further, that if the supplies be intercepted by the belligerent, he may not only confiscate them, but inflict corporal, if not capital, punishment upon those who seek to introduce them." Vattel[8] writes, "All commerce with a besieged town is absolutely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder any one from entering it, and to treat as an enemy whosoever attempts to enter the place, or carry anything to the besieged parties, without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war." The practice of Nations in the earliest times sanctioned the enforcement of the severest penalties against all merchants, who should attempt to enter any port, which had

6 De Jure Belli, L. III. c. 1. § 3.

7 Quæst. Jur. Publ. L. I. c. 11.

8 Droit des Gens. L. III. c. 7. § 117.

been placed under blockade by a belligerent Power. King Demetrius hanged up the master and pilot of a vessel carrying provisions to Athens at a time when he was on the point of reducing that city by famine[9]. So Pompey the Great, during the war against Mithridates, set guards at the mouth of the Bosphorus, to observe if any sailed into the Bosphorus; and whosoever were captured, were put to death[10]. Such extreme penalties, however, may be regarded as having long since fallen into desuetude, although there are modern publicists who maintain the absolute Right of a belligerent to have recourse to them. Thus Martens[11] says, that "a belligerent may forbid all commerce with a place which he is besieging or blockading, and the approaches to which he can occupy; and in every case he may confiscate the goods and ships of those, who attempt to trade with the enemy in spite of notice to abstain from so doing, and even inflict personal penalties and death upon them." So Heffter[12] says, "The seizure of the ship and cargo and their confiscation, whatever be the nature of the cargo or the character of its owners, constitute the penal sanction of the prohibition issued by the belligerent. The captain and his accomplices may also be subjected to severe penalties. The actual usage of Nations is in general accordance as to this principle; but the application of it has given rise to numerous complications and ardent disputes."

Regulated exercise of the Right of Blockade.

§ 101. It has been observed that the practice of belligerents to forbid by Proclamation all trade with the enemy, and to confiscate the property of parties contravening their Proclamation, was successfully impugned in the seventeenth century, as an immo-

9 Plutarch. in Demetrio.
10 Plutarch. in Pompeio.
11 Précis du Droit des Gens. § 314.
12 Das Europäische Völkerrecht, § 154.

derate and unreasonable exercise of belligerent Force, and may now be regarded as having no sanction from the modern law of European Nations. We may trace back to the same century the first systematic attempt to regulate the belligerent Right of Blockade, which originated with the Dutch.

The States General of the United Provinces, proceeding upon the advice of their Courts of Admiralty, issued an Ordinance on 26 June 1630, the object of which was to regulate the blockade of the Ports of Flanders, then in possession of the Spanish Crown. The purport of the first article of that Ordinance was, that neutral vessels found coming out of or entering into enemies' ports in Flanders, or so near to them that their intention to enter them was beyond all doubt, should be confiscated with their cargoes by sentence of the said Courts, "inasmuch as their High Mightinesses *keep the said ports continually blockaded* by their vessels of war at an excessive charge to the State, in order to hinder all transport to and commerce with the enemy; and because those ports and places *are reputed to be besieged*, which has been from all time an ancient usage after the example of all Kings, Princes, Powers, and other Republics, which have exercised the same Right on similar occasions[13]."

It will be seen that this Ordinance contemplates that three things shall be proved before the Courts of Admiralty: (1) the existence of a blockade *de facto;* (2) the reputation of such a blockade; and (3) an undoubted intention to violate the blockade. These three conditions are in perfect accordance with those laid down by Lord Stowell (12 Dec.

[13] Robinson's Collectanea Maritima, p. 158. These Ordinances are also set forth in a note to the Hurtige Hane, 3 Ch. Rob. p. 327.

1798[14]) in the case of the Betsey, and which have been approved by the Lords of Appeal in Prize Causes. "On the question of blockade," he says, "three things must be proved: 1st, the existence of an actual blockade; 2d, the knowledge of the party; 3d, some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade."

Legal requirements of a binding blockade.

§. 102. The point therefore which first requires to be considered is, what constitutes an actual blockade. It was one of the objects of the Armed Neutrality of 1780 to establish a more precise rule than had hitherto prevailed for determining that a port was actually under blockade, so as to impose upon neutral merchants an obligation to abstain from trading with that port[15]. In pursuance of that object the Empress of Russia communicated to the various European Powers a Declaration of the principles of the Armed Neutrality comprised in four propositions, the fourth of which was to the effect that, "in order to determine what characterises a blockaded port, that term shall only be applied to a port, where, from the arrangement made by the attacking Power with vessels stationed off the port and sufficiently near, there is evident danger in entering the port[16]." Great Britain acceded to this definition of a blockaded port in her Convention with Russia on 17 Jan. 1801[17], and the principles generally affirmed by the European Powers during the present century may be said to be

[14] The Betsey, 1 Ch. Rob. p. 93. The Mercurius, 1 Ch. Rob. p. 82.

[15] Declaration of 28 Feb. 1780. Martens, Récueil, Tom. III. p. 158.

[16] Que pour déterminer ce qui caractérise un port bloqué, on n'accord cette dénomination qu'à celui, où il y a, par la disposition de la Puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.

[17] Martens, Récueil, T. VII. p. 260.

in harmony with it. Thus at the outset of the war with Russia in 1854, France and England may be considered to have affirmed the same principle, which was maintained by the Armed Neutrality, when they declared their intention "to maintain the right of a belligerent to prevent neutrals from breaking any effective blockade, which may be established with an adequate force against the enemy's ports, harbours, or coasts." Upon the conclusion of peace with Russia the subject of Belligerent Blockade came under the consideration of the Powers assembled at Paris in the Congress of 1856, when it was agreed to remove all uncertainty amongst themselves by declaring their view of the Law Maritime on this subject, and by inviting all other Nations to accede to a common Declaration. The proposition which was accordingly adopted by the Congress was to this effect: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy[18]."

Declaration of the Congress of Paris.

§ 103. If it be assumed, that there is now an established Concert amongst the European Powers with the exception of Spain[19] on the subject of a binding Blockade, and that the business of European Courts of Prize in the majority of cases will henceforth be to ascertain whether an asserted Blockade is maintained in a manner which satisfies the Declaration of the Congress of Paris, it will be of importance to consider what is the meaning to be fairly attached to the words "sufficient really to pre-

[18] Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi. Martens, N. R. Gen. XV. p. 792. The English text is taken from a paper presented to both Houses of Parliament in 1856.

[19] Spain has not acceded hitherto to the Declaration of Paris.

Characteristics of an effective blockade.

vent access to the coast of the enemy," and whether there are any judicial decisions which will guide us in arriving at a just interpretation of those words. An analogous question came under the consideration of the High Court of Admiralty of England in the case of the Franciska[20] (25 Jan. 1855), when Dr. Lushington was called upon to determine, whether the blockade imposed upon the port of Riga was an Effective Blockade. That learned Judge, after observing that all definitions are and must be from the nature of blockades loose and uncertain, goes on to say, "The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention nor indeed more opposed to my notions of the Law of Nations than any relaxation of the rule, that a blockade must be sufficiently maintained: but it is perfectly obvious, that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence I believe that in every case the enquiry has been, whether the force was competent and present, and if so, the performance of the duty was presumed; and I think I may safely assert, that in no case was a blockade held to be void, when the blockading force was on the spot or near thereto, on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron."

The circumstance of one or two vessels being successful in eluding the vigilance of a blockading

20 The Franciska. Spinks, Ecclesiastical and Admiralty Reports, II. p. 128.

squadron has never hitherto been held sufficient to rebut the presumption of law arising from the fact, that a squadron adequate in point of numbers to command all the approaches to a port has been stationed before it, nor has the accidental absence of a blockading squadron from its cruising ground from stress of weather ever been adjudged to work a legal suspension of an actual Blockade. Lord Stowell has observed that when a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue for many months without being liable to such temporary interruptions[21]. But when a blockading squadron is driven off by a superior force, a new course of events may arise, which may tend to a very different disposition of the blockading force, and which introduces a very different train of presumptions in favour of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or conjecture, that the blockade will be resumed[22]. So if a blockading squadron should be despatched upon an expedition elsewhere, leaving only a small force to continue the blockade and to apprise vessels of its existence, such a measure has been held to be insufficient to maintain the blockade, as it is the duty of the blockading Power to keep such a force on the ground, as would be of itself sufficient to enforce the blockade. The Lords of Appeal held in the case of an alleged breach of the blockade of the island of Martinique, that the

[21] The Columbia, 1 Ch. Rob. p. 156.

[22] The Hoffnung, Schmidt. 6 Ch. Rob p. 117.

omission to keep a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, was a neglect which necessarily led neutral vessels to believe that those ports might be entered without incurring any risk[23]. The periodical appearance of a vessel of war in the offing could not be supposed to be a continuation of a blockade, which had been previously maintained by a number of vessels, and with such rigour that no vessel whatever had been able to enter the island during its continuance. On the other hand, Sir W. Grant held that under particular circumstances a single vessel may be adequate to maintain the blockade of one port and cooperate with other vessels at the same time in the blockade of another neighbouring port[24]; and likewise that the temporary absence of the blockading vessels from their station, whilst employed in chasing suspicious vessels, was no interruption of the blockade[25].

Knowledge on the part of the master of a vessel dispenses with actual warning.

§ 104. The second question which demands consideration, is what shall be taken to establish a knowledge of the blockade on the part of the master of a vessel attempting to enter or come out of a blockaded port. It is obvious that, as all questions of International Right presume good Faith, a knowledge of the fact of a blockade, howsoever acquired, will preclude a neutral master from any claim to receive a direct warning from the blockading squadron[26], even if the vessel should have sailed from the port, where she had shipped her cargo, without a knowledge of the blockade. Thus by Article XVIII

[23] The Nancy, Hurd. 1 Acton, p. 58.

[24] The Nancy, Woodberry. Ibid. p. 63.

[25] The Eagle, 1 Acton, p. 65.

[26] The Franciska. Spinks, Eccl. and Admiralty Reports, II. p. 113.

of the Treaty of Commerce between Great Britain and the United States of America[27] (19 Nov. 1794) it was provided that "Whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the place is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, confiscated, unless after notice." Lord Stowell was called upon to interpret this Treaty in dealing with the case of an American vessel taken in a voyage from Hamburg to Amsterdam, which latter port was under blockade. It appeared that the vessel had sailed from America with innocent intentions on the part of the owners, for it was not known at that time in America, that Amsterdam was in a state of investment. It was therefore contended on behalf of the owners, that under the Treaty with Great Britain, the vessel could not be confiscated for breach of blockade, unless she had attempted to enter the port of Amsterdam after notice that it was under blockade. "It has been said," observed Lord Stowell, in the course of his judgment, "that by the American Treaty, there must be previous warning. Certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required[28]. The Master, the Consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of this blockade, and therefore they are not in the situation

[27] Martens, Récueil, V. p. 676.

[28] The Columbia, 1 Ch. Rob. p. 154. Fitzsimmons *v.* The Newport Insurance Company, 4 Cranch, p. 185.

which the Treaty supposes." The Lords of Appeal have on a recent occasion affirmed Lord Stowell's view with this caution, that there must be no reasonable doubt of the fact, from which the knowledge of the master is to be presumed. "While their Lordships," they said, "are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron; yet the fact, with notice of which the individual is to be fixed, must be one which admits of no reasonable doubt. Any communication which brings it to the knowledge of the party, to use the language of Lord Stowell in the Rolla (6 Ch. Rob. p. 367) in a way which could leave no doubt in his mind as to the authenticity of the information, will be binding on him[29]."

Constructive notice.

§ 105. But there are cases in which no actual proof may be forthcoming from the ship's papers or otherwise against the Master and crew of a neutral vessel of their personal knowledge of the fact of a blockade, and yet there may be established against them a constructive knowledge, which will preclude them from setting up in their defence personal ignorance. Thus it has been held by the British Prize Courts, that where there has been a public Notification of a blockade from the Government of a belligerent to a neutral State, all the subjects of the latter must after a reasonable time[30] be supposed to be cognisant of the blockade. To allow individuals to plead ignorance of a blockade,

29 Northcote *v* Douglas (The Franciska). 10 Moore's P. C. Reports, p. 58.

30 The Neptunus, 2 Ch. Rob. p. 111. The Spes and Irene, 5 Ch. Rob. p. 79.

which had been notified to their Government, would entirely defeat the object of the Notification. "The effect of a Notification to any foreign Government," says Lord Stowell[31], "would clearly be to include all the individuals of that Nation: it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it. It is the duty of foreign Governments to communicate the information to their Subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a Notification of a blockade, that he is ignorant of it." Such being the Law of the English Admiralty Courts in regard to the Subjects of States to which a direct Notification of a blockade has been addressed, those Courts have further held that the Notification of a blockade from the Government of a State made to the principal States of Europe, will in time affect the rest, not so much *proprio vigore*, as in the way of evidence against them. The general notoriety of a blockade will therefore be presumed after it has been publicly notified and *de facto* maintained for a considerable time; and the English Prize Courts have held, that it would be a fraudulent omission on the part of a neutral master not to take notice of a matter, which was a subject of general notoriety in the port where he shipped his cargo, although it might not have been formally notified to his own Government. It was amongst the points insisted upon by the States General in their Ordinance of 26 June 1630, that the ports of Flanders were not merely blockaded *de facto*, but were *reputed* to be under blockade by the Dutch fleets. The necessity therefore of giving notice on the spot to vessels entering a blockaded port, before they can be justly

Public Notification.

General Notoriety.

[31] The Adelaide, 2 Ch. Rob. p. 111 in notis.

made liable to the consequences of breaking the blockade, does not arise when the blockade has been notified in a public and solemn manner by a Declaration on the part of the executive Government to foreign Powers. Where, on the other hand, the blockade is established by the commander of a squadron without any public Notification on the part of his Government, the notoriety of the fact of an actual blockade will not be presumed against the master of a neutral vessel, so as to disentitle him to the benefit of an actual notice from the blockading force on his arrival in the neighbourhood of the blockaded port. Thus the instructions transmitted by the Lords of the Admiralty on 8 January 1804 to Commodore Hood in regard to the blockade of the islands of Martinique and Guadaloupe were, that he was not to consider any blockade of those islands as existing, unless in respect of particular ports, which may be actually invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them[32]. It is otherwise however with vessels coming out of a blockaded port. There no notice is necessary, after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice, as it is impossible for those within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing in this case supersedes the necessity of particular notice to each ship[33].

The Fact of a blockade must accord with the Notification.

§ 106. M. Hautefeuille[34] discusses the blockade *by notification* and the blockade *by notoriety*, as if they were varieties of *paper blockades* or fictitious block-

32 Tutela, 6 Ch. Rob. p. 179.

33 The Vrow Judith, 1 Ch. Rob. p. 153.

34 Des Droits des Nations Neutres, Tit. IX. c. 5. § 1. and 2.

ades; but such is not the meaning of those terms as employed in the English Courts of Admiralty. The Lords of Appeal in Prize cases have long since held that a proclamation of blockade is not in itself sufficient to constitute a legal blockade[35]. Thus the West India islands were declared under blockade by Admiral Jarvis, but the Lords held that as *the fact* did not support *the declaration*, a blockade could not be deemed legally to exist[36]; and on a recent occasion during the Russian War (30 Nov. 1855) the Judicial Committee of the Privy Council held that the notice of a blockade must not be more extensive than the blockade itself, otherwise the neutral will be at liberty to disregard such notice, and will not be liable to the penalties attending a breach of blockade for afterwards attempting to enter the port which is really blockaded[37]. To the same effect Lord Stowell has observed, "There are two sorts of blockade; one by the simple fact only; the other by notification, accompanied with the fact[38]. It would be an error to suppose that the British Courts of Admiralty admit that the mere Notification of a blockade is sufficient to constitute a legal blockade: there must be likewise a blockade *de facto* at the time of Notification, otherwise the Notification will not have any legal effect. Such was the view of the British Government, as expressed by them in a note communicated to the Government of the United States of America in 1807, by its Minister, Mr. Forster, on the subject of the blockade of 1806 and 1807. "Great Britain," they said, "has never contested, that ac-

35 The Betsey, 1 Ch. Rob. p. 95.

36 The Mercurius, 1 Ch. Rob. p. 83.

37 Northcote *v.* Douglas (The Franciska), 10 Moore, P. C. Reports, p. 59.

38 The Neptunus, 1 Ch. Rob. p. 171.

cording to the customary Law of Nations every blockade, in order that it should be justified, ought to be maintained by a sufficient force, and place in danger every vessel that shall attempt to evade it. It was in accordance with this principle that the blockade of 1806 was not notified to foreign Powers by Mr. Fox, until after he had been convinced by a Report from the Board of Admiralty, that the Admiralty had adopted and would employ every means to watch the coast from Brest to the Elbe, and to place this blockade really in execution. The blockade therefore of the month of May 1806, was full and legitimate in its origin, since it was maintained not merely in *intention*, but in *fact* by a sufficient force[39]."

Practice of the French Courts as to notice.

§ 107. The substantial difference which the British Courts make between a blockade which has been notified to neutral Governments, and a blockade which has not been so notified, is, that vessels in the former case are not entitled to a direct warning from the blockading squadron, before they can be captured as Prize of War for violating the blockade. On the other hand, the French Courts are more lenient on the subject of direct warning; for the practice of the French Government[40] is to instruct their cruisers to give actual notice on the spot to all parties attempting for the first time to enter a port which has

39 A French version of this note, of which the above is a translation, is given by M. Hautefeuille, Tom. II. p. 257. The same doctrine was maintained in a note from Lords Holland and Auckland, the British Plenipotentiaries, addressed to Messrs. Monroe and Pinckney, the United States' Commissioners, 31 Dec. 1806. Papers presented to Parliament in 1808.

40 The ancient practice was more rigorous, if we may judge from the Règlement of 26 July 1778, (Lebeau, Tom. II. p. 58.) under which French privateers were authorised to capture all neutral vessels, "qui porteroient des secours à des places bloquées, investées, ou assiégées," no mention being made of a preliminary warning.

been placed under blockade, even where the blockade itself has been a subject of diplomatic Notification to neutral States. Such was the substance of the instructions given to the French cruisers both in 1827 and in 1830, when they established a blockade of the ports of the Regency of Algiers. Such also was the purport of the instructions contained in the Letter of Count Molé of 20th October 1838, which he addressed to the French Minister of Marine for the information of the commander of the French squadron then blockading the ports of Mexico[41]. M. Molé, in a despatch of 17th of May 1838, in reference to the blockade of the ports of the Argentine Republic, has stated very clearly the principles upon which the French Courts of Prize proceed: "Tout blocus pour être valable envers les neutres, doit leur avoir été notifié et être effectif.

"Un navire, se présentant devant un port bloqué avant d'avoir eu connoissance de blocus, doit d'abord en être averti, et la notification doit en être faite par écrit, et sur son rôle d'équipage. Mais cet avis ayant été donné, et cette formalité ayant été remplié, s'il persiste à entrer dans le port, ou s'il vient à s'y présenter de nouveau, le commandant du blocus a le droit de l'arrêter[42]."

In accordance with the above rules, we find the French Courts of Prize deciding on 21 Dec. 1847, in the case of La Louisa[43], captured in the waters of the River Plata, that it was not sufficient that the blockade should have been notified to foreign Powers: it was necessary that the ship itself should have notice of the existence and extent of the blockade,

41 This letter is given *in extenso* by M. Ortolan, in his Diplomatie de la Mer, Tom. II. p. 304.

42 Pistoye et Duverdy, Traité des Prises Maritimes, Tom. I. p. 382.

43 Ibid. p. 382.

and that the notice should be entered on the ship's log before she could be captured and condemned as prize of war for violation of the blockade. On the other hand, the same Courts on 4 March 1830 condemned the vessel La Carolina[44], as good prize, because there had been an effective blockade of the ports of the Regency of Algiers, established since the month of May 1827, in virtue of orders transmitted from the French Government; and that the master of the Carolina had been warned of the existence of the blockade some days before the capture of his vessel, and a notice to that effect had been entered in the log of the vessel; and that after this direct warning, he had attempted to break the blockade, and enter the port of Oran."

Practice of the United States Courts as to notice.

§ 108. The doctrine of the British Courts of Prize, that due notice of a blockade may be received constructively, has been adopted by the jurists of the United States of America. Thus Chancellor Kent writes[45]: "It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. This information may be communicated to him in two ways; either actually by a formal notice from the blockading Power, or constructively by notice to his Government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it. A notice to a foreign Government is a notice to all the individuals of that Nation, and they are not permitted to aver ignorance of it, because it is the duty of the neutral Government to communicate the Notice to

44 Pistoye et Duverdy, Prises Maritimes, Tom. I. p. 381.

45 Commentaries of American Law, Tom. I. p. 147.

their people. In the case of a blockade without regular notice, notice in fact is generally requisite; and there is this difference between a blockade regularly notified, and one without such notice, that in the former case the act of sailing for the blockaded place with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination[46]. The question of notice is a question of evidence to be determined by the facts applicable to the case. The notoriety of a blockade is of itself sufficient notice of it to vessels lying within the blockaded port[47]."

Violation of a blockade.

§ 109. The third question to be considered is what conduct renders a neutral vessel liable to capture and condemnation for violating a blockade. By the second article of the Ordinance of the States General of the United Provinces, issued on 26 June 1630, already referred to, it was provided "that neutral vessels and their cargoes should be confiscated, when it shall be found from their cargo-papers or other documents that they have been laden in the blockaded ports, or are destined to go to such ports, although they should be found at such a distance from them, that they might possibly change their voyage and intention. This rule being founded on the fact that they have already embarked upon an illicit enterprise and put it in train of execution, although

46 The Columbia, 1 Ch. Rob. p. 130.

47 The Neptunus, 2 Ch. Rob. p. 110.

they have not completed it nor brought it to the last point of perfection, the only exception to it can be permitted, when the masters and owners of such vessels can duly show, that they have desisted of their own accord from their enterprise and illicit voyage, before any vessel of war came in sight of them or gave chase to them[48]." The English and American Courts of Prize proceed in the present day upon the principles maintained by the States General in regard to vessels, which have once set sail with an intention to enter a port known to the masters of such vessels to be under blockade. "It has been said," observed Lord Stowell[49], "that the vessel had not arrived, that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade of the Texel was beginning to execute that intention; and is an overt act constituting the offence. From that moment the blockade is fraudently evaded." In commenting upon this and other judgments of the English Courts, that eminent American Judge, Chief-Justice Marshall, has observed, "Neither the Law of Nations nor the Treaty (between the United States and Great Britain) admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed that in such cases the fact of sailing is coupled with

[48] Robinson's Collectanea Maritima, p. 165. Bynkershoek, Qu. Jur. Publ. L. I. c. 11.

[49] The Columbia, 1 Ch. Rob. p. 155. Cf. Madeiros *v.* Hill, 8 Bingham, p. 231.

the intention, and the sentence of condemnation is founded on an actual breach of the blockade[50]." The same learned Judge in another case[51] observed that "sailing from Tobago to Curaçoa, knowing Curaçoa to be blockaded, would have incurred the risk of breaking the blockade; but sailing for that port without such knowledge did not incur it."

The rule of the English Courts in considering the act of sailing for a blockaded port to be in law an attempt to enter it, is a peremptory rule in the case of a blockade, which has been notified by the belligerent Government to neutral Governments, inasmuch as in the case of a blockade which has been publicly notified, the parties despatching the ship are not entitled to presume that the blockade has been raised, unless the revocation of the blockade has also been publicly notified[52].

Equity of British Prize Courts.

§ 110. A certain equity has been administered by the English Prize Courts towards vessels which have been despatched from a port very distant from the blockaded port. Thus Lord Stowell held that American vessels were entitled to the benefit of a contingent destination to be ascertained and rendered definite, by the information which they should receive in Europe. "It must be inferred," he says, "and indeed admitted, that the Notification of the blockade of Havre had been received in America. To all general rules of observance of a blockade duly imposed, the subjects of America are undoubtedly bound equally with those of other countries. At the same time, looking to the great distance at which they are placed, and being unwilling to press with

[50] Fitzsimmons *v.* The Newport Insurance Company, 4 Cranch, p. 185.

[51] Yeaton *v.* Fry, 5 Cranch, p. 335. Cf. The Nereide, 9 Cranch, p. 446. Kent's Commentaries, Tom. I. p. 150.

[52] The Vrow Johanna, 4 Ch. Rob. p. 109.

any degree of hardship on the fair convenience of commerce, the Court has held, even when the blockade of a port in Europe has been notified in America, that the merchants of that country might still clear out conditionally for the blockaded port, on the supposition that before the arrival of the vessel a relaxation might have taken place. But as to the line of caution to be observed in this state of uncertainty, the Court has always expected that the enquiry should be made at some of the British ports in the Channel. It could not be, that ships should be permitted to resort to the ports of the blockaded country for the information, since every one must perceive that such a liberty would place it in the power of the enemy to determine the continuance of the blockade. The ports of the blockading country are certainly the proper ports for enquiry; and it would not be too much to expect, that this precaution should be noted in the papers, and that it should be most explicitly enjoined on the master and supercargo in their instructions to obtain the information, which might be necessary to fix the destination, at some of the British ports in the Channel[53]."

In another case[54] Lord Stowell declared it "to be a measure of necessary caution and of preventive legal policy to hold the rule general against the liberty of enquiring at the very mouth of the blockaded port, as such a liberty would amount in practice to an universal license to enter, and on being prevented to claim the liberty to go elsewhere." On the other hand, the Lords of Appeal in Prize Causes have ruled that it was not a necessary ground for condemnation, that the captain of an American vessel had instruc-

53 The Shepherdess, 5 Ch. Rob. p. 265. The Betsey, 1 Ch. Rob. p. 335.

54 The Spes and Irene, 5 Ch. Rob. p. 81. Cf. The Posten, 1 Ch. Rob. note, p. 336.

tions to make enquiry of the cruising vessels off the Eyder respecting the existence of the blockade of the River Elbe[55], and that he had not, in fact, made enquiry during the prosecution of his voyage up the Channel in some British Port. They have also ruled that the captain of an American vessel might be instructed to go to Heligoland for a pilot, and there make enquiry if the blockade of the Weser was raised, without thereby exposing his vessel to condemnation for violation of the blockade. But the Lords of Appeal have held in all such cases that, in order to entitle the claimants to the favourable consideration of the Prize Tribunal, the strictest proof of *bona fides* is required, as the presumption of law in the absence of such proof would be adverse to the claimant of the ship and cargo[56].

§ 111. After the blockade of a port has once been established, every neutral vessel, the master of which voluntarily attempts to enter the port with his vessel either in ballast, or in cargo, without a license from the Government of the blockading Power, is liable to capture and condemnation for breach of the blockade. A license, however, which is expressed in general terms, to authorise a ship to sail from any port in the Baltic with a cargo, will not authorise the same vessel to sail from a blockaded port with a cargo taken in there. To exempt a blockaded port from the restrictions incident to a state of blockade it must be specially designated with such an exemption in the license; otherwise a blockaded port will be taken as an exception to the general description in the license[57]. Licenses however are to be favourably regarded; and it imports the honour and good faith of a Government

Favourable Construction of Licenses.

55 The Little William, Acton, p. 141.

56 The Dispatch, Ibid. p. 163.

57 The Byfield, Edwards, p. 188.

which grants them, not to press the *letter* of them too rigorously. Thus a license to go to the ports of the Vlie, Embden, Rotterdam, or elsewhere, was granted by the British Government to an American vessel, which on arriving at Falmouth had found that the port of Amsterdam was under blockade. It was held by Lord Stowell[58] that the license must be taken to include Amsterdam, as being one of the ports of the Vlie. So a license granted to import Spanish wool from Holland, dated on the day of the date of the Notification of the blockade of Holland, was interpreted to give the parties the full benefit of importing such articles without molestation from the blockading squadron[59]. If however the master of a neutral vessel should have been involuntarily driven to enter a blockaded port by stress of weather, or want of provisions[60], or need of water, or by some other imperative and overruling necessity, such necessity will excuse him from the charge of violating the blockade, if his vessel should be captured. But it will not be sufficient for him in such a case to show that there were existing and adequate causes to explain the circumstance of his vessel seeking refuge in the blockaded port; it must be established beyond a doubt, that the vessel under the circumstances could not have proceeded without hazard to any other port than the blockaded port[61], in other words, that the necessity was imperative.

Breach of blockade by egress.

§ 112. A vessel coming out of a blockaded port is *prima facie* liable to seizure, and if the cargo has been taken on board since the commencement of the

[58] The Juno, 2 Ch. Rob. p. 116.

[59] The Hoffnung, 2 Ch. Rob. p. 162.

[60] The Fortuna, 6 Ch. Rob. p. 27.

[61] The Hurtige Hane, 2 Ch. Rob. p. 127. The Arthur, Edwards, p. 263. The Charlotta. Ibid. p. 232.

blockade, both ship and cargo will be liable to condemnation[62]. "A blockade," says Lord Stowell, "is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel, is, that having already taken on board a cargo, before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule, which this Court means to apply, that a neutral ship, departing, can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act and a violation of the blockade[63]." The United States' Courts have held the same doctrine[64]. Further, it is not necessary, that the whole of the cargo should be laden on board after the blockade has commenced, in order to render the departure of the vessel from the blockaded port an unlawful act. When any portion of the cargo has been taken on board after the existence of the blockade is known in the port, the act of egress is treated as a fraud against the right of the belligerent. This rule of the Prize Courts is founded on the principle that the interposition of a neutral in any way to assist in exporting goods from an enemy's port, after a blockade of that port has been established, tends directly to relieve the enemy

[62] The Frederick Molke, 1 Ch. Rob. p. 86.

[63] The Vrow Judith, 1 Ch. Rob. p. 152. The Comet, Edwards, p. 33.

[64] Oliveira *v.* Union Insurance Company, 3 Wheaton, p. 183.

from the distress which the blockade was intended to create, and that the continuing to take in cargo after the time when the master of the neutral vessel was bound to take notice of the blockade, is inconsistent with good faith towards the blockading power[65].

Egress lawful in certain cases.

§ 113. It has been already observed that neutral vessels, which have entered an enemy's port before that port has been placed under blockade, may come out in ballast without violating the blockade, for their egress under those conditions cannot in any way prejudice the blockading power[66]; and neutral vessels may also come out of a blockaded port without violating the blockade, if they have been compelled to enter it, after the blockade has been established, from stress of weather or other imperative necessity. Neutral vessels are also at liberty to come out without molestation if they have entered the port under the authority of a license from the Government of the blockading Power; for such license to enter the port implies a permission to come out of it[67]. Again, a neutral vessel does not violate a blockade by reshipping and bringing out of a blockaded port goods which have been sent into the port before the blockade by a neutral merchant for sale, and which have been found unsalable, and are *bonâ fide* withdrawn by the owner[68]. Again, a neutral vessel may take on board, and bring out after the commencement of a blockade a cargo, which has been purchased by a neutral merchant from the enemy during the blockade, if there be a well founded expectation of an immediate war between the country of the neutral merchant and that to which the blockaded port be-

[65] The Calypso, 2 Ch. Rob. p. 298.

[66] The Juno, 2 Ch. Rob. p. 119.

[67] The Charlotta, Edwards, p. 252.

[68] The Juffrow Maria Schrœder, in notis, 4 Ch. Rob. p. 89.

longs, and consequently the danger of the seizure and confiscation of the property in port is imminent[69]. Again, if a neutral ship arriving at the mouth of a blockaded port in ignorance of the blockade, is suffered to pass into the port, she may freely come out in ballast, for she has entered the port under an implied permission which fully protects her egress[70]. Or if a vessel, of which the master has sailed with a knowledge of a blockade, is directly permitted by the blockading squadron to enter a blockaded port[71], or having been informed by a cruiser of the belligerent Power that the blockade has been raised, thereupon makes her way without molestation into the blockaded port, the vessel is entitled to free egress from the same port[72]. In the case of the Rose in Bloom[73], Lord Stowell intimated, that if a vessel sailing out of a blockaded port of France under American colours had been employed by the American Consul resident in the port for the sole purpose of taking home distressed American seamen, who had been thrown out of employment and detained in the ports of France by the violence of the ruling Power there, she would have been entitled to a very favourable consideration from the blockading Power, whose Courts of Prize, from motives of humanity, might reasonably allow such a case to be an exception to the general rule.

§ 114. If a neutral vessel has violated a blockade by egress, she is regarded as still *in delicto* until she has reached her port of destination, and completed

Duration of *delictum* after egress.

69 The Drie Vrienden, 1 Dodson, p. 269.

70 The Christina Margaretta, 6 Ch. Rob. p. 63.

71 The Juffrow Maria Schroeder, 3 Ch. Rob. p. 149. The Vrow Barbara, ibid. in notis, p. 158

72 The Neptunus, 2 Ch. Rob. p. 110.

73 The Rose in Bloom, 1 Dobson, p. 58.

her voyage[74]. Thus we find it directed by the third article of the Ordinance of the States General of 26 June 1630, above referred to, that "vessels returning from the ports of Flanders, with the exception of such as have been driven into them by an extreme necessity, although they should be met with at a great distance from those ports by vessels of the State without having been previously pursued by any of the blockading fleet, shall be confiscated, because such vessels are held to have been taken in the fact as long as they have not completed their voyage, and have not arrived in some port which is free, or belonging to a neutral Prince. Such vessels indeed with their cargoes shall not be liable to be confiscated if they shall have arrived in any such port as specified, unless they have been pursued in coming out of the ports of Flanders by some vessel of war, and have taken refuge in such port, not being their own port, nor the port of their destination, and shall have ventured out to sea again, and been captured on the high seas." Bynkershoek[75], in commenting on this Ordinance of the States General observes, that the exception in favour of a vessel which has arrived at her own port, if it is intended to distinguish such a port from her port of destination, is not reasonable. "A British vessel," he says, "which has come out of a blockaded port of Flanders, destined to a Danish port, and having taken refuge from the pursuit of the blockading squadron in a British port, afterwards ventures out to sea and pursues her original destination to a Danish port, appears to be still *in itinere et ipso actu*." He is therefore disposed to construe the Dutch Ordinance, as granting the exemption to ves-

74 The Weelvaart Van Pillaw, 2 Ch. Rob. p. 128. The General Hamilton, 6 Ch. Rob. p. 61.

75 Quæstiones Jur. Publ. L. I. c. 11.

sels which had arrived in their own port, as the *terminus* of their voyage; and he cites a decision of the Admiralty Court of Zealand (27 Jan. 1631) in regard to a vessel which had been purchased by a Scotchman in the port of Dunkirk, which was at such time under blockade, and which escaped out of Dunkirk, and took refuge from pursuit in the port of Yarmouth, which was not her actual port of destination. On venturing out of Yarmouth in prosecution of her original voyage, the vessel was captured on the High Seas by a Dutch cruiser, and condemned as good prize to the captors. So likewise Lord Stowell, in dealing with the case of a Prussian ship which had escaped out of the port of Amsterdam, then under blockade, and had been captured by a British cruiser off Dungeness, observed, that if the principle is sound that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, he knew no other natural termination of the offence, but the end of the voyage. "It would be ridiculous to say, If you can get past the blockading force, you are free: this would be a most absurd application of the principle. If that is sound, it must be carried to the extent that I have mentioned, for I see no other point, at which it can be terminated. Being of opinion that the principle is sound, I shall hold that if a ship, that has broken a blockade, is taken in any part of that voyage, she is taken *in delicto*, and is subject to confiscation[76]." Lord Stowell has further laid it down, that a vessel which has committed a breach of blockade by egress, shall not have her offence purged by being driven by stress of weather into a port, which is not her port of destination. Such an accident, he says, is not entitled to

[76] The Weelvaart Van Pillaw, 2 Ch. Rob. p. 130.

be considered as any discontinuance of the voyage, or as a defeasance of the penalty which has been incurred[77].

Effect of fraud in egress.

§ 115. An exception to the rule, that the offence of violating a blockade by egress is purged upon the arrival of the vessel at her port of destination, was made by Lord Stowell in a case which was altogether novel, but of which the importance was considerable, when viewed in the extent of the consequences to which it might lead. A neutral vessel was blockaded in the port of Rotterdam, and could only come out under the indulgence of a British Order in Council, which made an exception in favour of vessels bound to a neutral port. She came out in cargo with an ostensible destination to the neutral port of Smyrna, but on her voyage she put into Alicant, in Spain, under pretext of requiring repairs; and then having sold her cargo, took on board a return cargo for Copenhagen. She was captured by a British cruiser on her return voyage, and the ship and cargo were condemned, as prize, to the captor. Lord Stowell, in considering this case, observed, that "she was in fact blockaded in the port of Rotterdam, and could not come out with a cargo, unless going to a neutral port. The permission to go to a neutral port, if accepted, implies a contract that that destination shall be *bonâ fide* pursued. The vessel avails herself of the indulgence, and comes out with a professed intention of acting conformably to the Order. But the fact turns out, that she deposits her cargo in a port, to which she would not have been permitted to go, if the real intention of the voyage had been disclosed. This is unquestionably an act of perfidy; and I ask by what means can the Order be maintained,

77 The General Hamilton, 6 Ch. Rob. p. 62.

or such conduct be repressed, unless by the application of the penalty to the subsequent voyage. Until the vessel had actually entered an interdicted port, nothing appeared whether she was *in delicto* or not. Cruisers see nothing; she goes in, and then the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again, that any opportunity is afforded of vindicating the law, and of enforcing the restriction of this Order[78]." This case may be regarded as analogous in some respects to a breach of blockade by ingress, in which there is no opportunity of enforcing a penalty until the offending vessel ventures out again to sea. There is however one case in which the offence of entering a blockaded port may be purged before the vessel comes out, and in which likewise the penalty of violating a blockade by egress may be determined, before the offending vessel has reached her port of destination. This case arises, whenever the blockade itself is raised. Lord Stowell observed, in the case of the Lisette, that he knew of no case in which a vessel had been condemned, which had been seized for the breach of a bygone blockade. The same reason for rigour in such a case no longer exists, because the blockade being gone, the necessity of applying the penalty to prevent future transgression cannot continue. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*[79].

Cargo not always condemned with the ship.

§ 116. It is a general rule that both ship and cargo are confiscable for the breach of a blockade, and the presumption of law is that the violation of a blockade is intended for the benefit of the cargo as well as of the ship, and takes place with the sanction of the

[78] The Christianberg, 6 Ch. Rob. p. 381.

[79] The Lisette, 6 Ch. Rob. p. 392.

owners of both[80]. This presumption, unless it be rebutted by documents found on board of the ship when captured, is a *præsumptio juris et de jure*, which excludes all other evidence to the contrary. In cases where the ship and cargo belong to the same individuals, it is obvious that no difficulty can arise, for the act of the master, as the legal agent of the owner of the ship, will affect his principal to the extent of the whole of his property concerned in the transaction[81]. On the other hand, where the ship and the cargo are the properties of different individuals, the reasonable conclusion is, that the master of the ship does not hazard the interests of his vessel except in the service of the cargo. There is a necessary presumption also in such cases, that this is done with the cognisance and at the instigation of the owner of the cargo[82]. But it may happen that the fact of a blockade is known to the master of a ship, but not to the owner of the cargo; as for instance, a vessel may have begun her voyage when the blockade of her port of destination did not exist, or when it was unknown to the owners of the cargo; and it may happen that the master, having been informed of the blockade during his voyage, or having been warned off at the entrance of the blockaded port, has persisted in pursuing his course to his original destination. In such a case no question of fact can arise whether the owner of the cargo was consentient to the breach of the blockade[83]. Other cases may be supposed; as for instance where a vessel has been despatched in ballast to fetch a cargo from a port, which is placed under blockade after she has entered

[80] The Alexander, 4 Ch. Rob. p. 93.

[81] The Columbia, 1 Ch. Rob. p. 154, affirmed on appeal, 12 August 1801.

[82] The Adonis, 5 Ch. Rob. p. 261. The Alexander, 4 Ch. Rob. p. 93.

[83] The Adonis, 5 Ch. Rob. p. 262.

the port, and the owner of the cargo has no opportunity of ascertaining the fact of the blockade, so as to countermand the shipment of his cargo[84]. In such a case Lord Stowell has observed, that it would be hard to bind the owners of the cargo by the act of her agents in the blockaded port, as they do not stand in the same situation as other agents. They have not only a distinct but even an opposite interest from that of their principal, namely, to fulfil the commission at all risks as rapidly as possible, for their own private advantage and for the public interests of their country, at such a time under particular pressure as to the exportation of its produce. This may be fairly allowed to impose a strong obligation on the candour of the Court not to hold an employer too strictly bound on mere general principles by an agent, who may be actuated by interests different from those of his principal[85].

Extent of coast which may be placed under blockade.

§ 117. There is no limit to the extent of coast along which the blockade of an enemy's ports may be extended, short of the natural limit of a force adequate to maintain the blockade really and effectively. The British Government in 1806 declared the ports of the Continent of Europe, from Brest to the River Elbe, to be under blockade. In the circular note bearing date 16 May 1806, and addressed to the Ministers of Neutral Governments then resident in London, Mr. Fox, the British Secretary of State for Foreign Affairs, announced "that a consideration of the novel method adopted by the enemy for the interruption of British commerce, had determined the British Government to issue orders for placing in a state of blockade all the coasts, rivers,

84 The Neptunus, 3 Ch. Rob. p. 173. The Adelaide, Ibid. p. 177. The Adelaide, Ibid. p. 281.

85 The Neptunus, 3 Ch. Rob.

and ports, from the Elbe to Brest inclusively, and that these rivers and ports were accordingly to be considered as actually blockaded[86]." On this occasion the British Government maintained that the blockade was not notified to Foreign Governments, until the necessary measures had been adopted by the British Admiralty to make the blockade effective[87], and that the blockade itself was maintained by a force sufficient to make the entrance into the ports along the line of coast, included within the limits of the blockade, manifestly dangerous. If it be assumed, as a matter of fact, that these conditions were fulfilled, there can be no doubt that the lawfulness of the blockade was not in any way affected by the great extent of coast over which it was maintained. In the war carried on by the United States of America against Mexico in 1846, all the ports, harbours, bays, outlets, and inlets, on the West Coast of Mexico south of San Diego, were declared by Commodore Stockton to be under blockade. The United States Government on this occason, in reply to the suggestions of the British Government that such a proceeding savoured of a paper blockade, did not express any doubts of their Right to maintain so extensive a blockade; but they stated that under Commodore Stockton's general Notification no port on the West Coast was regarded as blockaded, unless there was a sufficient force to maintain it, actually present, or temporally driven from such actual presence by stress of weather, intending to return[88]. In the war de-

[86] Cf. Manning's Law of Nations, p. 332.

[87] Note presented by M. Forster, the British Minister, to the United States Government, in 1807. Hautefeuille, Des Nations Neutres, Tom. II. p. 257.

[88] Note from Mr. Buchanan, of 29 Dec. 1846, to Sir Richard Pakenham, with its enclosure. Correspondence with the United States Government respecting blockade, presented to Parliament by command of her Majesty, 1861.

clared on 28 March 1854, by the three Allied Powers, Great Britain, France, and the Ottoman Porte, against Russia, the combined fleets of Great Britain and France established a blockade of the whole of the Russian Ports in the Baltic and in the Gulfs of Finland and Bothnia. So likewise in the war which is at present being carried on by the Government of the United States of America against the States which seceded from the Federal Union in 1861, and have formed themselves into a Confederation of States under the name of the Confederate States of America, the Government of the United States has established a blockade of the whole of the ports on the seaboard of the Confederate States, and this blockade has been enforced against neutral vessels with the same rigour, as the blockade of a single port is entitled to be enforced under the Law of Nations.

On the other hand the penalties for breach of a blockade can only be applied to vessels engaged in trade with the ports of the blockaded coast. They cannot be extended to vessels carrying cargoes to ports, which are connected by an inland water-communication with the blockaded ports, nor to vessels carrying cargoes to ports, from which the cargoes are to be dispatched over land to the blockaded ports[89]. Thus Lord Stowell held that there would be no breach of the blockade of Amsterdam committed by a vessel carrying to Rotterdam or to Embden goods, which had an ulterior destination to Amsterdam by land, or by an interior canal navigation. A blockading squadron can only apply its force to a blockaded port from the side of the sea. The internal communications of a country are out of its reach, and in no way subject to its operation.

[89] The Ocean, 3 Ch. Rob. p. 298. The Jonge Pieter, 4 Ch. Rob. p. 83. The Frau Margaretha, 6 Ch. Rob. p. 92.

Limited operation of a blockade.

§ 118. It is competent for a belligerent Power to limit the operation of a blockade, provided that the limitation applies to all neutral Nations in an equal manner. Thus the Commanders of the French and British fleets established a blockade of the mouths of the Danube, with the object of preventing supplies being carried to any Russian port on that river. They accordingly forbade the vessels of all neutral Nations from entering the river.

Nous sousignés, vice-amiraux, commandant en chef les forces navales combinées de France et d'Angleterre dans la Mer Noire, déclarons par la présente, au nom de nos gouvernements respectifs, et portons à la connoissance de tous ceux que la chose peut intéresser, que nous avons établi le blocus effectif du Danube, afin d'arrêter tout transport d'approvisionnements aux armées Russes.

Sont comprises dans ce blocus toutes celles des embouchures du Danube, qui communiquent avec la Mer Noire, et avertissons, par les présentes, tout batiment de toute Nation, qu'ils ne pourront entrer dans ce fleuve jusqu'à nouvel ordre.

Le Vice-Amiral, commandant en chef l'escadre française,
HAMELIN.

Le Vice-Amiral, commandant en chef l'escadre britannique,
G. W. D. DUNDAS [90].

Fait à Baltchik 1 *Juin*, 1854.

Again, on the occasion of Great Britain establishing a blockade of the ports of the continent of Europe from Brest to the river Elbe, that blockade was to be limited in its effect by a division of the line of coast into two parts, of which the part from Ostend to the river Seine was to be considered as under the most rigorous blockade, while the rest of the line was allowed to be open to the navigation of neutral vessels, laden with other goods than contraband of war or enemy's property, as long as those

[90] Sammlung Officieller Actenstücke in Bezug auf Schiffahrt und Handel in Kriegszeiten. V. p. 13. Hamburg, 1854.

vessels had not been laden at a port belonging to or occupied by the enemies of Great Britain, or on the other hand were not proceeding to such port from the blockaded line, and provided those vessels had not previously violated the blockade[91]. This order was further restricted on 15 Sept. 1806 by a Notification, that the blockade was raised on that part of the line, which extended from the Elbe to the Ems inclusively.

Effect of a blockade on licenses.

§ 119. It was observed by Lord Stowell in the Byfield that a license expressed in general terms, which purports to authorise a vessel to carry a cargo into or out of any of the enemy's ports, will not authorise her to enter or come out of an enemy's port, which is under blockade. In order that a blockaded port should be exempted from the restrictions, which are incident to a state of blockade, it must be specially designated with such exemption in the license, otherwise a blockaded port shall be taken to be an exception to the general description in the license[92]. This *dictum* of Lord Stowell seems rather to conflict with the view taken by him at an earlier period in the case of the Hoffnung[93], when he held, that when a license had been granted to certain vessels, pursuant to a Power given to his Majesty in Council under an Act of Parliament, to import Spanish wool from ports of Holland, it operated to protect the parties acting under it from the effects of a blockade, which had been notified on the same day on which the license was granted. "I think," he says on this occasion, "that I am bound to presume that it was intended the parties should

[91] Manning's Law of Nations, p. 332.

[92] The Byfield, Edwards, p. 188. 9 Dec. 1809.

[93] The Hoffnung, 2 Ch. Rob. p. 162. 20 Aug. 1799. The Juno, 2 Ch. Rob. p. 116.

have the full benefit of importing these articles without molestation from a blockade, which could not be unknown to the great Personage, under whose authority, and in whose name this license issued. I add further, that I think this license bears very materially on some other licenses which had been previously granted; for when I see that the blockade was not considered as a ground for withholding those licenses, I am led to suppose that it was not intended to have the effect of suspending the operation of such as had been already granted." Sir Alexander Croke, the learned Judge of the Vice-Admiralty Court of Halifax, in considering the mutual bearing of these two judgments of Lord Stowell upon each other, concluded that the *dictum* of Lord Stowell in the Byfield must be construed in connection with the particulars of the case, and that all, which Lord Stowell decided in that case was, that as the Byfield was lying in an open port of the enemy at the time the license was granted to it, the subsequent transaction within a blockaded port, which it was sought to protect by the license, was not in contemplation, when the application for the license was made, and therefore the intention of the Government which issued the license, to protect the transaction could not be presumed. Sir Alexander Grant accordingly held, that the judicial opinion expressed by Lord Stowell in the Hoffnung remains untouched by his decision in the Byfield; and that notwithstanding there is no express provision in a license or a blockading order to that effect, yet whenever it appears to have been the *intention* of his Majesty or of those who exercise his authority, that the permission given by a license should not

be suspended by an order of blockade, it is not affected by a blockade[94]. To the same purport the Lords of Appeal in Prize Cases (the Judicial Committee of the Privy Council) decided in the case of the Franciska (30 Nov. 1855) that the Order in Council of 29 March 1854, under which "Russian merchant vessels in any ports or places of her Majesty's dominions should be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels if met at sea by any of her Majesty's ships should be permitted to continue their voyage, if on examination of their papers it should appear that their cargoes were taken on board before the expiration of the above term: Provided that nothing therein contained should extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government," gave to all Russian vessels which did not come within any of the specified exceptions, full liberty to sail in security to their port of destination, although such port might be in a state of blockade[95].

Effect of licenses on a blockade.

§ 120. By the Law of Nations, "a belligerent may not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral Nations; and therefore no blockade can be legitimate that admits to either belligerent a

94 The Orion, Stewart's Reports, p. 506. In this case Sir A. Croke held that a license to an enemy protected him in egress from a port subsequently blockaded, as the nature of the trade afforded a presumption of such being the intention of the license.

95 The Franciska, 10 Moore, P. C. p. 55.

freedom of commerce denied to the subjects of States not engaged in the war. The foundation of this principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations in the nature of trade being by war itself suspended[96]." Such is the forcible language of Dr. Lushington in the case of the Franciska. To this principle the Lords of Appeal (the Judicial Committee) gave their full adhesion, and in applying it to the state of things arising out of the British orders in Council, issued at the commencement of the war with Russia, under which free ingress into Russian ports for a certain time was granted to Russian vessels sailing from ports in the British dominions, and free egress from Russian ports for a certain time was granted to Russian vessels bound with cargoes to British ports, they held that during such interval of time, as was covered by these Orders in Council, no valid blockade of the Russian ports in the Baltic could be established by the British fleet. It is obvious that so long as enemy-vessels are allowed by a belligerent Power freely to enter or to come out of enemy-ports, the condition of things, which alone authorises a belligerent to interfere at all with the trade of neutrals does not exist, namely, the necessity of interdicting all communication by way of trade with the ports in question, in order to compel the enemy to submission. In arriving at the conclusion, that the British Orders in Council issued on this occasion granting for six weeks to enemy vessels free access to their ports of destination forbade the establishment of any blockade of the Baltic ports during such time by British

[96] The Franciska, Spinks's Eccl. and Adm. Reports, II. p. 135.

vessels, to the prejudice of neutral commerce, the Lords of Appeal made a distinction which is worthy of notice: "No doubt," they said, "ships of one belligerent at the outbreak of war, found in the ports of another, into which they have entered for peaceful purposes, with the expectation of the continuance of peace, form an exceptional class which has a strong claim to an indulgent exercise of the right of capture; and an express permission to such ships to enter their port of destination, though blockaded, might perhaps not affect the validity of the blockade. It might fall within the class of cases alluded to by the learned Judge of the Court below, of license granted in particular cases upon special grounds. Such a case is very distinguishable from one where a belligerent, with a view to the interests of his own commerce, permits enemies' ships to bring him cargoes from their own ports, though he at the same time insists on a blockade of such ports against neutrals[97]."

[97] 10 Moore, P. C. p. 56.

CHAPTER VII.

CONTRABAND OF WAR.

Origin of the term Contraband — Application of the term to international trade—Treaty of Southampton of 1625—First Proclamation of King Charles I. — Second Proclamation of 1626 — Earliest Catalogue *in extenso* — Zouch on Fetial Law—Queen Elizabeth and the Envoy from Poland—Queen Elizabeth and the Hanse Towns — Albericus Gentilis—Klüber — Heffter—Early Conventions in restraint of neutral trade with an enemy's country—Placaarts of the States General in the sixteenth century—Practice of European Powers at the end of the sixteenth century—Practice of the seventeenth century—Doctrine of Grotius as to Contraband of war—Treaty of Westminster of 1654—Treaty of Paris of 1655—Treaty of the Pyrenees of 1659—Treaty of Whitehall of 1661—Treaties of Breda and Madrid of 1677—Treaty of St. Germain-en-Laye of 1677—Treaty of Whitehall of 1689—Opinion of Sir Leoline Jenkins—Treaty of Utrecht of 1713—British Treaty-engagements—Concurrence of European Nations as to certain articles—Bynkershoek's view—Vattel—Italian and Spanish Jurists—French Jurists—Practice of British Prize Courts—Practical difficulty of specifying articles conditionally contraband—General doctrine of British Prize Tribunals—British Treaty with United States of 1796—Treaty Right of Preemption—Treaty of Westminster of 1656—Treaty of Whitehall of 1661—Treaty of Orebro of 1812—Treaty of Upsal 1654 — Equity as to conditional contraband — Ships under circumstances contraband of war—Transport, not sale of merchandise penal by the Law of Nations—Treaty-engagements between Prussia and the United States of America—Belligerents may not interfere with trade within the jurisdiction of a neutral State.

Origin of the term Contraband.

§ 121. *Contraband* is a term of positive law, and in its primary sense denotes something prohibited

by *Ban*, or Edict. The word is probably of Italian origin, (*Contrabbando*[1],) as the earliest document in which any trace of it is extant is an Italian Charter of A. D. 1445[2], in which the Latin equivalent *Contrabannum* is used in relation to a trade prohibited by the Sovereign Power of a State to its citizens in time of peace. The term is not employed by Grotius, the first edition of whose work[3], De Jure Belli et Pacis, was published in 1625; but it occurs in a Treaty of offensive and defensive alliance concluded at Southampton in that year, (17 Sept. 1625,) between King Charles I of England and the United Provinces of the Low Countries; from the language of which it would seem that the term *Contraband* had at that time a recognised acceptation amongst Nations, in reference to a branch of maritime trade, which was prohibited to merchants in time of war "Toutes marchandises de contrebande, comme sont munitions de bouche, et de guerre, navires, armes, voiles, cordages, or, argent, cuivre, fer, plomb, et semblables, de quelque part qu'on les voudra porter en Espagne, et aux autres pays de l'obéissance du dit Roy d'Espagne et de ses adhérens, seront de bonne prise avec les navires et hommes qu'ils porteront." Art. XX.[4]

§ 122. It would be a difficult task in the present day to determine with precision the circumstances under which the word *Contraband*, which was ori- Application of the term to international trade.

[1] The Spanish phrase is, 'Mercaderias de contravando.' D'Abreu, c. 11.

[2] Item quod non permittant committentes *contrabannum* dicti salis, vel aliarum rerum in dictis locis tuto et secure permanere. Ducange, Gloss. vox *Contrabannum*.

[3] The word *Contraband* does not occur in the Guidon de la Mer, the author of which is unknown; but the compilation of which work M. Pardessus has, with great probability, assigned to the latter part of the sixteenth century.

[4] Dumont, Traités, Tom. V. Part II. p. 480.

ginally a term of municipal law, came to be applied to a trade in certain articles carried on by the subjects of a Neutral Power with the ports of a belligerent State; and whether the use of the term in the Treaty of Southampton[5] was suggested by the fact, that belligerent Powers had been long accustomed at the outset of war to forbid, by Declarations[6] formally communicated to neutral Powers, all trade with the ports of their enemies in certain articles of merchandise; or that Neutral Powers were beginning, in pursuance of treaty-engagements, to prohibit their own subjects by public Proclamation from transporting over sea certain articles of merchandise in time of war to the ports of belligerent States. The more probable opinion would seem to be, that the various Treaties which were concluded amongst the maritime Powers of Europe on the subject of Contraband of War in the first half of the seventeenth century, were entered into with the object of regulating an acknowledged Right on the part of every belligerent State to interfere with the trade of neutral subjects to the enemy's ports, and of restraining the exercise of that Right within just limits; and that the engagements on the part of neutral States not to permit their Subjects to transport over sea certain articles of merchandise to the enemy's country were auxiliary to that object. That the term *Contraband*, as employed in the Treaty of Southampton, was intended to denote articles of merchandise forbidden under the Proclamation of a belligerent Power to be carried to an enemy's ports, may fairly be inferred from the

Treaty of Southampton of 1628.

5 This seems to be the earliest treaty in which the phrase 'Marchandises de contrebande' occurs.

6 Instances of such declarations on the part of England will be found in Camden, anno 1591 and 1597. Grotius enumerates various instances of similar declarations on the part of other Powers in a note appended to Lib. III. c. 1. § 5. 1. De Jure Belli et Pacis.

fact, that a Proclamation was issued by King Charles I. on 31 Dec. 1625, shortly after the signature of that Treaty, which in accordance with its provisions purported "to declare that all ships carrying corn or other victuals, or any munition of war, to or for the King of Spain, or any of his subjects, shall and ought to be esteemed as lawful prize."

First Proclamation of King Charles I.

§ 123. It was recited in this Proclamation "that whilst the King of Spain continued in terms and courses of hostility, it was neither agreeable with the rules of policy or Law of Nations to permit the said King of Spain or his subjects to be furnished or supplied with corn, victuals, arms, or provisions for his shipping, navy, or army, if the same can be prevented. The King accordingly, with the advice of his Privy Council, formally notified to all manner of persons of all conditions, that shall send or carry into Spain, Portugal, Burgundy, or any other the said King of Spain's countries, or dominions, any manner of grain or other victuals, or any manner of provisions to serve to build, furnish, or arm, any ships of war, or any kind of munition for the war, or materials for the same, being not of the nature of mere merchandise, that, as it is lawful for his Majesty, being a Monarch and Prince Sovereign, and as other kings in like cases have already used to do, he will not only authorise his own admirals and captains of his own ships of war, serving on the seas, but will also allow and approve all other his subjects to arm their ships at their will, and with them to impeach and arrest all ships that shall sail, either out of the East ports, or out of the Low Countries, or from any other ports, with intention to pass Spain, Portugal, Burgundy, or any other the King of Spain's countries or dominions, or to any the King of Spain's ships, being on the seas, having on

board any such grain, victuals, or provisions of war, or furniture for shipping, or materials for the same; and the same to bring into the next good port, there to be ordered as goods duly forfeited for the benefit of his Majesty, where his Majesty's ships shall arrest the same, and to the benefit of such others, as being not in his Majesty's wages shall by their travel and adventure have stayed and arrested such ships and goods prohibited[7]."

Second Proclamation of 1626.

In the following year (4 March 1626) a second Proclamation[8] of a more special character was published by the same Monarch, entitled "a Proclamation to prevent the furnishing the King of Spain and his subjects with provisions for shipping, or munition for the war, and with Victuals." The purport of the previous proclamation having been recited in the preamble, the second proclamation goes on to declare that "his Majesty intending to remove all pretext of ignorance or other exception which may be taken against the proceedings of his judges and officers, with any the subjects of his friends, confederates, or allies, who shall hereafter offend in the premises, has thought fit, by these presents to make further declaration, as well of the species or kinds of the things so prohibited as of the penalties to be suffered by the parties delinquent in supplying the enemies with the same prohibited things. Concerning therefore those kinds wherewith his Majesty may not suffer his said enemies to be furnished, his Majesty does by these presents publish and notify, that he holdeth these things following to be of that quality and condition, *videlicet*, 'ordinance, armes of

7 It appears under this proclamation that private ships equally with public ships of war were authorised to capture neutral vessels carrying merchandise, which was contraband of war.

8 Rymer, Fœdera, Tom. XVIII. p. 856. Robinson's Collectanea Maritima, p. 63.

all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kindes, hempe, saile, canvas, danuce pouldavis, cables, anchors, mastes, rafters, boate oars, balcks, capraves, deale board, clap board, pipe staves, and vessels, and vessel staffe, pitch, tarr, rosen, okam, corne, graine, and victualls of all sortes, all provisions of shipping, and all munition of warr, or of provisions for the same, according to former declarations and acts of State, made in this behalfe in the time of Queen Elizabeth, of famous memorie.'" This is probably the earliest catalogue *in extenso* of articles of merchandise deemed contraband of war[9], for it does not clearly appear that the articles prohibited had been specifically set forth in the former declarations of Queen Elizabeth. On the contrary, it seems probable, from the writings of Dr. Zouch[10] and Albericus Gentilis[11], that the judgments of the Admiralty Courts in the reign of that Queen had

Earliest Catalogue *in extenso.*

9 The earlier treaties of 1604, 1614, 1615, which are to be found in Dumont's Traités, Tom. V. do not specify in detail the articles of merchandise prohibited to be carried to enemy's ports.

10 Dr. Zouch in his Treatise on Fetial Law, first published in 1634, refers to several disputes on the subject of contraband of war between Queen Elizabeth and Foreign Princes, and amongst others, to the dispute with Spain as to tobacco being an article of provision, and consequently contraband of war. The Spanish Prize Courts declared tobacco to be an article of provision, and accordingly confiscated a British ship which was carrying a cargo of tobacco to the Low Countries; whereupon Queen Elizabeth granted Letters of Reprisal to the owners of the ship and cargo against the commerce of Spain. Pars II. § 8.

11 Albericus Gentilis, in his Advocationes Hispanicæ, c. 20, discusses the case of a British ship laden with a general cargo and some gunpowder sailing to Constantinople, under a license from Queen Elizabeth, which had been captured by the Knights of Malta, as carrying munitions of war to an infidel nation contrary to the prohibition of the Canon Law. Gentilis points out that infidels, as such, could not be regarded as enemies in the sense in which it was forbidden by the Law of Nations to carry munitions of war to an enemy, and observes that the Canon Law did not furnish any rule for such matters in England. "Etiam licita ad Turcos fieri per placita Reginæ Elizabethæ. Has patrias

first contributed to give precision to the catalogue of *bona prohibita*. What was the penalty of carrying such prohibited goods is thus set forth in the sequel of King Charles's second Proclamation : " And therefore, if any person whatsoever, after three months from the publication of these presents, shall by any of his Majesty's own ships, or the ships of any of his subjects authorised to that effect, be taken sailing towards the places aforesaid, having on board any of the things aforesaid, or returning thence in the same voyage, having vented or disposed of the said prohibited goods, his Majesty will hold both the ships and goods so taken for lawful prize, and cause them to be ordered as duly forfeited, whereby as his Majesty doth put in practice no innovation, since the same course has been held, and the same penalties have been heretofore inflicted by other States and Princes, upon the like occasions, and avowed and maintained by public writings and apologies, so now his Majesty is in a manner enforced thereto by proclamations set forth by the King of Spain and the Archduchess, in which the same and greater severity is professed against those, that shall carry or have carried without limitation the like commodities into these his Majesty's dominions[12]." It would appear from both the above proclamations, that the usage of Princes was relied upon in evidence of the Right of a belligerent to impose penalties on neutral merchants for giving aid to an enemy by carrying munitions of war to his ships or his dominions. It will be important therefore to consider what that usage of Princes was at the commencement of the seventeenth century.

leges norunt Angli, quas sequuntur : alias et canonicas illas non norunt, quæ exulant etiam ex Anglia."

[12] Rymer, Fœdera, Tom. XVIII. p. 856. Robinson's Collectanea Maritima, p. 63.

§ 124. Dr. Zouch, in his treatise on Fetial Law[13], published in the earlier part of the seventeenth century, in discussing the question whether it is lawful to intercept the goods of friends on their way to an enemy, "An res amicorum ad hostes transeuntes intercipere liceat?" gives the substance of an interview, which is also narrated by Camden[14], between the Ambassador of Sigismund King of Poland, and Queen Elizabeth of England, when the former complained with great vehemence, on behalf of the King his master, of a violation of the Law of Nations, by her Majesty prohibiting Polish merchants from carrying their goods to Spanish ports, and thereupon demanded both the restitution of such goods as had been captured by British cruisers, and for the future perfect freedom of navigation to Spain. Queen Elizabeth having first administered to the Ambassador the well-known rebuke, that she had been greatly deceived, for that she had expected an Ambassador and found a Herald[15], went on to say, "As regards the Law of Nations, you ought to know, that when war has broken out between kings, it is lawful for either party to intercept any aid or supplies which are sent to the other, and to provide that no harm shall accrue therefrom to himself. This, we tell you, is according to the Law of Nature and of Nations, and has not been done by us alone, but by the kings of Poland and of Sweden in their wars against the Muscovites[16]."

Zouch on Fetial Law.

Queen Elizabeth and the Polish Envoy.

[13] Juris et Judicii Fetialis sive juris inter Gentes et quæstionum de eodem explicatio. Oxon. 1634.

[14] Camdeni Hist. Eliz. anno 1597.

[15] Quam decepta fui! Legatum expectavi, Heraldum inveni. Zouch, p. 128.

[16] Quod tu jus gentium prætendis, scire debes, exorto inter reges bello, licere uni parti auxilia vel subsidia ad alteram partem missa intercipere et providere, ne damni quicquam inde sibi accidat. Hoc nos dicimus Naturæ et Gentium juri esse consentaneum et non a nobis solum, sed etiam a Poloniæ Sueciæque regibus factitatum in bellis quæ cum Muscovitis gesserunt. P. 128.

It appears from the annals of the reign of this Queen that she justified on several occasions the capture of the ships and merchandise of neutrals on their way to an enemy's country, on the ground that it was allowable by the laws of war to capture such ships and their cargoes. One of the most remarkable of these instances arose upon the capture of a fleet of sixty vessels belonging to the Hanse Towns (anno 1589), which were carrying corn and naval munitions to Spain. The Hanse Confederation alleged that the capture of their ships and cargoes was in violation of their ancient privileges. Queen Elizabeth in reply observed, that the corn on board their vessels was justly confiscated, for that she had forewarned them not to carry any supplies to one, who had declared himself to be so notorious an enemy of her kingdom. Besides, in the diplomas of privileges granted to the Hanse merchants by her predecessors, it was specially provided that they should not carry merchandise to the notorious enemies of her kingdom. That they had been previously warned by Royal Letters under her hand and by the Alderman of the Hanse Confederation, resident in London, not to carry corn or other military or naval munitions to Spain or Portugal, and that by disregarding the prohibition and the warning, they were the authors of their own loss. That unless the Hanse Confederation had supplied the King of Spain with victuals and other munitions of war, he could not have kept up hostilities, and prevented peace being restored to Europe, and that by the supplies furnished by them the King of Spain was rendered more able to carry on the war against England and Wales, and to attempt to subjugate both countries and reduce them to a province of Spain. Nor was the proceeding on the part of the English Crown by any means novel,

Queen Elizabeth and the Hanse Towns.

since there had been numerous instances in which the merchants of the Hanse League, as well as the merchants of other countries, had been prohibited in like manner from trading with the enemy by various European powers, and there were precedents of the Hanse League, when engaged in war, imposing like prohibitions upon the subjects of neutral states[17]."

French Ordinance of 1543.

It would also appear from the language of a very early French Ordinance[18] (A. D. 1543), that in the sixteenth century the French King claimed to exercise the right of preventing munitions of war being transported to the enemy's country in the ships of neutrals, irrespective of any treaty obligation upon the part of such neutrals to refrain from such commerce, for he expressly authorises and permits his subjects to capture such munitions of war, and bring them into his ports, there to be adjudged prize to the captors. "Mais pourront nozdits alliez et confederez faire leur traficque par mer dedons navires qui soient de leur obeissance et sujection, et par leurs gens et subjects, sans y accueillir nos ennemis et adversaires; lesquels biens et marchandises ainsi chargées ils pourront mener et conduire où bon leur semblera, pourveu que ce ne soyent munitions de guerre dont ils vousissent fortifier nozdits ennemis; auquel cas nous avons permis et permettons à nos dits subjects les prendre et amener à nos ports et havres, et les dites munitions

[17] This Reply is set forth *in extenso* in a letter of 2 July 1599, addressed by Mr. Secretary Cecil to Sir Henry Nevile, the English Ambassador at Paris, which is found in Winwood's Memorials, vol. i. p. 57. It is worthy of perusal as containing a full exposition of the English view of the law in such matters, and its contents show how much its purport has been misrepresented by many writers, who have spoken of it as an attempt to reduce Spain by famine. Cf. Causes Célèbres du Droit des Gens, par le Baron Charles de Martens, II. p. 334.

[18] Lebeau, Code des Prises, Tom. I. p. 17.

retenir selon l'estimation raisonnable, qui en sera faite par nostre dit admiral ou son lieutenant."

Usage of Europe in the sixteenth century.

§ 125. It seems to have been the established usage of Europe in the middle of the sixteenth century for belligerent Powers to prohibit all merchants from carrying munitions of war to the ships or dominions of their enemies, and to confiscate all vessels laden with such munitions, if taken on the High Seas on their way to the enemy's country. Albericus Gentilis, in discussing the lawfulness of the capture of an English ship, taken by Sardinian and Maltese cruisers on a voyage to Constantinople with a general cargo including some barrels of gunpowder, and which was in judgment before a Spanish Court of Admiralty, observes, that "the capture was justifiable by the Civil Law, by the Canon Law, by the Law of Nations, and by Conventions between England and Spain[19]." Thus the Civil Law had made it a capital offence for any one to supply Barbarians with oil, wine, or any munition of war[20]. The Canon Law had similarly forbidden all Christians to supply any munitions of war to the Saracens[21]. The practice of England on the other hand, in regard to the merchants of the Hanse Towns, in not permitting them to carry provisions to Spain, was evidence of the Law of Nations[22], whilst the Treaty of 1604 concluded between Philip III of Spain, the Archduke Albert and his wife Isabella, and James I of England, bound each of the contracting parties not to supply or consent

Albericus Gentilis.

[19] Hispanicæ Advocationes, L. I. c. 20.

[20] Cod. L. IV. Tit. XLI. Quæ res exportari non debeant, c. 1 and 2.

[21] Concil. Lateran. III. anno 1179. (Alexander III.) Decretal. Greg. IX. L. V. Tit. VI. c. 12. anno 1190. Concil. Lateran. IV. anno 1215. (Innocent III.) Extravag. Joann. XXII. Tit. VIII. (anno 1316.) Bulla Cœnæ Domini, c. 7.

[22] Albericus Gentilis, de Jure Belli, c. 21.

to its subjects supplying to the enemies of the others any soldiers, provisions, money, instruments or munitions of war, or warlike aid of any kind whatsoever[23]. Most writers refer the origin of belligerent prohibitions against the trade of neutrals with the enemy to the Confederation of the Hanse Towns; and after the subject of Contraband of War came to be formally regulated by international compacts, the Hanse Towns were amongst the foremost of the Maritime Powers to enter into Conventions with other Powers.

§ 126. Certain writers[24] have contended that the whole law of Contraband of War rests upon Conventions, and that there is no Common Law of Nations in such matters. "In the absence of treaties," says Klüber. Klüber, "the Natural Right of Nations, which establishes complete liberty of commerce, is in force, and all merchandise ought to be presumed free." Heffter Heffter. with justice combats this view as being at variance with historical truth, and observes that the declarations of the Armed Confederations of the Baltic Powers in 1782, and in 1801, contain nothing in support of this theory: on the contrary those Powers were not opposed to the *principle* of "contraband of war," but only to the arbitrary application of it; and they advocated a common agreement amongst Nations as to *details*. If the facts of history may be appealed

[23] Item quod neutra partium præstabit nec præstari per aliquos suos vassallos subditos incolasve consentiet auxilium, favorem, vel consilium directe nec per indirectum, tam per terram quam per mare et aquas dulces, nec subministrabit nec subministrari consentiet per dictos vassallos, incolasve et subditos Regnorum suorum, milites, commeatus, pecunias, instrumenta bellica, munitiones, vel aliquodvis aliud auxilium ad bellum confovendum hostibus, inimicis, ac Rebellibus alterius partis, cujuscunque generis sint, tam invadentibus Regna, patrias ac dominia alterius, quam se subtrahentibus ab obedientia et dominio alterius. Dumont, Traités, Tom. V. Pars II. p. 32.

[24] Lebeau, Code des Prises, Tom. I. p. 15. Jouffroy, Droit Maritime, p. 3. Klüber, Droit des Gens, § 288.

to in elucidation of the controversy, it would appear that the Nations of Europe claimed in the sixteenth century to capture on the High Seas *jure belli* the vessels and goods of the subjects of neutral Powers, which were on their way to an enemy's ports, on one or other of these grounds[25], either that the trade was in contravention of some treaty-engagement with the neutral Power, whereby it had bound itself not to give aid or to consent to its subjects giving aid to the enemy of the belligerent, or that the belligerent had prohibited the trade by an express notice to the neutral, that under the particular circumstances of the war certain articles could not be considered in the nature of mere merchandise, being things required by the enemy to enable him to maintain hostilities. It had been usual from a very early period to introduce a clause into treaties, whereby either of the contracting parties bound itself not to give aid to the enemies of the other. Thus in one of the earliest Treaties between England and France (A. D. 1303), it was provided: "Item. Accordé est que l'un ne receptera ne soustendra ne confortera, ne sera confort, ne ayde aus ennemis de l'autre; ne ne souffera qu'ils aient confort, secours ne ayde, soit de gent d'armes, ou de vitailles ou d'autres choses queles qu'eles soient, de ses terres ne de son poiar[26]." But even in such cases discussions sometimes arose as to the meaning of the word *aid*, which was used in the treaties, whether or not it extended to any goods which were merchandise of usual traffic to other countries. Thus in the discussions between Sir Ralph Sadler, the Envoy of King Henry VIII, and the Government

Early Conventions in restraint of neutral trade.

[25] Pactis enim Principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Bynkershoek, Quæst. Jur. Publ. L. I. c. 10.

[26] Rymer, Fœdera, Tom. II. p. 927.

of Scotland (A. D. 1543), respecting the detention of some Scotch vessels by the English Government, it was contended on behalf of the English Crown, that as the vessels were carrying victuals to French ports, it was a breach of treaty, for that the Scotch were bound not to minister any kind of aid to the enemies of England. To which the Scotch Government made answer, that there was no other cargo on board those said vessels than fish, which was a common article of traffic between the two countries in time of peace, and that they could not perceive by the treaties, that merchants being subjects of either realm might not use their accustomed traffic with such merchandise, as they have been in use to transport to other countries. The English Envoy replied, that "fish could not be deemed to be victuals, and being laden in the said ships to be transported to France, which was in open hostility with England, was a certain kind of aid ministered to the enemies of England, and therefore a lawful and just cause to stay the said ships[27]." Thus much for Treaty-Engagements in restraint of the freedom of neutral trade in time of war. On the other hand, Albericus Gentilis[28] lays great stress on the fact that Queen Elizabeth had notified to the Hanse Confederation not to carry provisions into Spain, before she captured their vessels; and the Protestants are represented by De Thou to have replied to the complaints of the Portuguese, by reason of twenty-five Portuguese vessels having been captured, bound with cargoes of corn to Spanish ports, "Jure belli tales spoliari naves, quippe rem edictis et constitutionibus regiis pro-

[27] Sir Ralph Sadler's Letters and Negotiations in Scotland, p. 381.

[28] Hispanicæ Advocationes, L. I. c. 20. p. 92.

Placaarts of the States General in sixteenth century.

hibitam esse[29]." The Right of a belligerent Power to prohibit by notice or proclamation the trade of neutrals with the enemy's country was so absolutely maintained in practice, that we find the States General of the Low Provinces, during their war with Spain in 1599, issuing a Placaart, which they made known to all Kings and Nations, whereby they forbade all merchants to carry to the Spaniards provisions or any other goods whatsoever, under the penalty of being treated as enemies[30]. The historian informs us that King Henry IV of France directed his subjects to submit to this Placaart for six months, and that the other Powers of Europe passed it over in silence. But it would appear from a letter of Sir Henry Nevile to Mr. Secretary Cecil, that the English Government held this Placaart of the States General to be "an effect of great necessity, which had no law[31]."

Practice of European Powers at the end of sixteenth century.

§ 127. The general practice of Belligerents, as gathered from the Placaarts and Ordinances issued by various Powers in the latter part of the sixteenth and in the early part of the seventeenth century, shows that Belligerent States held themselves entitled of Right, if they considered it to be necessary to secure a successful issue to the war, in which they were engaged, to interdict neutrals from furnishing any supplies to their enemy. This practice had the support of Publicists, who held that the Right of the Belligerent in such a case was a Natural Right of a public character, which must prevail over the pri-

29 Loccenius, De Jur. Maritimo, L. I. c. 9. Thuani Historia, L. 64.

30 Grotius, Hist. de Rebus Belgicis, L. VIII. Per edictum vetant populos quoscunque alios commeatus resve alias in Hispaniam ferre : si qui secus fecerint, ut hostibus faventes, vice hostium futuros.

31 This Letter bears date, Paris, 15 May 1599, O.S., and is found in Winwood's Memorials, Vol. I. p. 23.

vate right of a merchant to carry on his trade. "Jus commerciorum æquum est," writes Albericus Gentilis, "sed hoc æquius tuendæ salutis; est illud gentium jus, hoc naturæ est; est illud privatorum, hoc est regnorum[32]." These views of the Publicists of the seventeenth century have been commented on by Azuni and Lampredi. The former says, "Publicists lay it down as a principle, that a Nation has a complete and perfect right to diminish indefinitely the forces of its enemy, to frustrate all the means which its enemy can employ to preserve or augment his forces, and even to prevent any other Nation from carrying on a commerce with its Enemy, which may increase his resources or his means of attack and defence[33]." Lampredi writes thus: "It is permitted to friendly and neutral Nations to continue their trade in its full extent: the only restriction which war imposes upon their liberty in this respect is, that they observe strict impartiality between the belligerents; nevertheless a belligerent Nation may prevent the Commerce of Neutrals with the Enemy, from the moment that it considers it necessary for its own safety to do so[34]." This practice may be said to have culminated in the Placaart of the States General of 1599, already referred to, by which they prohibited neutral merchants from carrying any goods whatever to Spanish ports; in other words, by which they placed all the ports of the King of Spain under an Interdict. On the other hand, if a neutral Nation did not acquiesce in the view of necessity, under which the Belligerent claimed a right to act in capturing the vessels and goods of the subjects of the neutral Nation, it was open to the latter to make

32 De Jure Belli, Comment. I.

33 Droit Maritime de l'Europe, T. II. c. 2. Art. 2. § 6.

34 Commerce des Neutres, c. 1. § 4.

Reprisals. Thus during the war between the States General and Spain, a Spanish cruiser captured a British vessel, which was bound to a Dutch port with a cargo of tobacco. The Spanish captors on this occasion maintained successfully before the Spanish Prize Court, that tobacco was rightly to be considered amongst victuals, inasmuch as by the use of tobacco the consumption of victuals might be prolonged. The English claimants on the other hand contended in vain that tobacco was not a nutritive plant, and that it had not been interdicted by the express words of the Spanish Proclamation. The judgment of the Prize Court was in favour of the captors. The English owner therefore made complaint to the King of England, who upon the advice of his Council, granted to the owner letters of Reprisal against the subjects of the King of Spain, in order that he might make good his loss[35].

Practice of the seventeenth century.

§ 128. The application of the word Contraband for the first time in the Treaty of Southampton (1625) to articles which neutrals might not rightfully carry to an enemy's country in time of war, seems to be confirmatory of the fact, that the Right of a Belligerent to interdict by formal notice the trade of a Neutral in certain articles with the Enemy's country, was fully recognised in the early part of the seventeenth century. King Charles I thought it right, in pursuance of this Treaty, to issue a formal Catalogue *in extenso* of the articles which he intended not to allow to be carried to the enemies of England, for England had previously maintained against Spain,

35 Processes in the Court of the Admiralty of England, cited in Zouch, de Judicio inter Gentes, § 8. Part II. p. 132. Tobacco is specified amongst the articles, which were not to be regarded as contraband of war, in the treaty between Charles II of England and the States General, (1 Dec. 1674). Dumont, VII. Pars. I. p. 283.

that *parity of reason* was not sufficient to render merchandise confiscable, unless it had been interdicted by express words. During the period which intervened between the conclusion of the Treaty of Southampton in 1625, and the Treaty of the Pyrenees in 1650, a great change seems to have come over the opinions of Statesmen, or a great modification to have taken place in the policy of the European Powers, in regard to the trade of Neutrals in time of war. The subject is too obscure to admit of a complete elucidation. The probability is, that both suppositions are correct, and that whilst the writings of Grotius had contributed to mould the opinions of Statesmen into a more reasonable form, the necessities of international commerce had compelled the European Powers to modify their policy.

Doctrine of Grotius as to Contraband of war.

§ 129. "There have been formerly," says Grotius[36], "and still are great disputes as to what may lawfully be done to those who are not our enemies, nor are willing to be thought so, and yet furnish our enemies with supplies. This is a point which has been sharply contested, both in ancient and in modern times, some maintaining the extreme right of war, others the liberty of commerce. In the first place, we must distinguish between the things themselves; for there are some things which are of use only in war, as arms; others which are of no use in war, but serve only for pleasure; others which are useful both in war and in peace, as money, provisions, ships and their appurtenances. Concerning the first kind, it is true, what was said by Amalasuntha to Justinian, that they are on the side of the enemy who supply him with things necessary for the war. As to the second class of things, no complaint can be raised.

[36] De Jure Belli et Pacis, L. III. c. 1. § 5.

With regard to the third class, which are objects of equivocal use, the circumstances of the war must be considered; for if I cannot protect myself unless I intercept what is sent, necessity will give me a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. But if the supplying of the articles will impede the execution of my design, and the party who transports them might have known this fact; as for instance, if I am besieging a town, or blockading a port, and a surrender or a peace is daily expected; he will be liable to me for damages, and his property may be taken to satisfy the damages. If he has not done the damage, but is only attempting to do it, his property may be detained until he give security for the future; but if the injustice of my enemy be very clear, and the supplies conveyed to him support him in his unjust war, then shall the party who conveys them to my enemy be not only liable to repair my loss, but he may be treated as a criminal, as one who is rescuing a notorious offender from impending judgment; and for this reason it will be lawful for me to deal with him according to his offence, and for the purpose of punishment I may deprive him of his merchandise."

§ 130. The Peace of Westphalia (A.D. 1648) having secured the independence of the United Provinces from all further dispute upon the part of Spain, and the Navigation Act, which had been passed by the English Parliament under the Commonwealth in 1651, being justly regarded by the Dutch as intended to secure to British shipping a portion of the carrying trade hitherto enjoyed exclusively by Holland, we find that after these events, a more lenient policy, in reference to the trade of Neutrals in time of war, began to find favour with the States General, owing,

as is most probable, to the counsels of the Grand Pensionary John de Witt. Thus the States General had concluded treaties with Sweden and with the Hanse Towns in 1613, under which provisions were to be regarded as prohibited merchandise during war. They had also concluded in 1625 a treaty with England, in which provisions were enumerated amongst the articles described expressly as Contraband of War. But on 6 April 1654 a treaty[37] was concluded at Westminster between the United Provinces and the Commonwealth of England, under the seventh article of which it was agreed that "neither party should supply to the enemies of the other any soldiers, arms, munitions of war, or other prohibited goods; or any money, provisions, or victuals, by sea or by land; and that all ships, arms, munitions of war, and prohibited goods, also money and provisions to whomsoever belonging, which shall be supplied contrary to the sense of this article, shall be confiscated: and that all parties contravening this article, shall be adjudged enemies of both countries, and be punished as such in the country where they may be captured: with regard, however, to the specification of what shall be considered as prohibited or Contraband goods, Commissioners shall determine the matter at a convenient time, without prejudice however to the provisions of the article itself." The first observation which suggests itself on reading the above article is, that money and provisions are not enumerated amongst goods considered as prohibited or Contraband, although it is agreed that neither party shall supply them to the enemies of the other. This departure from precedent was most probably the result of the influence of the Grand Pensionary De Witt, as he

Treaty of Westminster of 1654.

37 Dumont, Traités, Tom. VI. Part II. p. 74.

had pronounced his opinion in the early part of this year[38], that Neutrals were not prohibited by the Common Law of Nations from carrying corn to a belligerent country. De Witt was himself an advocate of the doctrine of Free Ships Free Goods, and was at this time negotiating with France to obtain several modifications of the severity of her Prize Code[39]. France, on the other hand, as appears from Sir Henry Nevile's negotiations[40] in 1599, had been for some time unwilling to consider corn, as merchandise absolutely prohibited in time of war to be imported into the ports of a belligerent by neutral merchants. It is not surprising therefore that France should be found taking the lead amongst the European Powers in adopting a more lenient rule than that which the Dutch and British negotiators had agreed upon in the Treaty of Southampton (A.D. 1625), when they declared provisions generally under the title of 'munitions de bouche' to be contraband. We find accordingly a treaty of commerce concluded between Louis XIV and the Hanse Towns (Paris, 10 May 1655), in which a catalogue of Contraband of War was set forth, from which provisions were omitted. This catalogue deserves notice, as upon its model, with the omission of cordage and sail-cloth, almost all the subsequent treaties on the subject of Contraband of War in the seventeenth century were framed :—

Treaty of Paris of 1655.

ART. XI. Lesquelles marchandises de contrebande sont entendues être munitions de guerre, armes à feu ; scavoir, canons, mousquets, mortiers, bombes, pétards, grenades,

38 A letter to that effect, dated 14 Jan. 1654, is cited in a note to Vattel. Droit des Gens. L. III. c. 6. § 112.

39 Lettres et Négotiations de Jean de Witt, Tom. I. p. 108.

40 Winwood's Memorials, Vol. I. p. 23.

saucisses, cercles, affûts, fourchettes, bandoulières, poudre, mesche, salpestre et toutes autres sortes d'armes, comme picques, espées, morions, casques, cuirasses, hallebardes, javelots, et autres armes servans à la guerre, ensemble des chevaux, des cordages, et des toiles noyales, qui ne puissent servir qu'à faire voiles; pourront néammoins porter des bleds et grains de toutes sortes, legumes et autres choses servans à la vie, si ce n'est que les villes et places où ils les transporteront fussent attaquées par sa Majesté et que volontairement ils les y transportassent, sans y être forcéz par les ennemis de sa Majesté, et se servant par violence de leurs vaisseaux trouvez dedans leurs Portes, ou ailleurs; auquel cas pourront les Commandans des Vaisseaux de sa Majesté retenir les dits grains et autres choses servans à la vie, en payant leur juste valeur, suivant l'estimation qui en sera faite, sinon et à faute d'estimation et de payement en deniers comptans, les sujets desdites Villes Anséatiques pourront se retirer librement avec leurs vaisseaux et marchandises, si ce n'est qu'elles fussent de la qualité de celles spécifiées cy-dessus, pour être de contrebande[41].

Treaty of the Pyrenees of 1659.

§ 131. France having thus secured the consent of one of the Great Maritime Powers to the mitigation of the more severe rule, which made provisions Contraband of War, came to an agreement with Spain on the same subject under the Treaty of the Pyrenees, A.D. 1659, which is most frequently referred to by Publicists as furnishing the rule for determining what is Contraband of War by the common consent of the Nations of Europe. It may be justly said, that there is no dispute amongst the Nations of Europe respecting the merchandise enumerated in the twelfth article of this treaty being all unlawful merchandise for neutral merchants to carry to an enemy's country :—

ART. XII. Sub hujusmodi mercibus prohibitis, sive de Contre-bande, comprehensæ solummodo intelliguntur omnis generis machinæ ignivomæ et alia huc pertinentia instrumenta; verbi gratia, tormenta ænea majora, sclopeta, mor-

[41] Dumont, Traités, Tom. VI. Pt. II. p. 103.

taria, exostræ, globi incendiarii, granatæ, saucissæ, coronæ et serta ignea, tormentorum bellicorum fulcimina lignea, sclopetariorum furcillæ, coramina ad pulveris ac plumbi mensuras reponendas apta, pulvis pyrus, funes incendiarii, sal nitrum, glandes, longiores hastæ, gladii, cassides, galeæ, loricæ, bipennes, sarissæ, equi, ephippia, bulgæ, quibus sclophi inseruntur, baltei, aliaque hujus farinæ ad bellum spectantia.

The next following article of the treaty, which excludes provisions from the list of Contraband of War may be considered to have the consent of all the Nations of Europe, so far indeed as it recognises the Right of a belligerent Power to confiscate the merchandise enumerated, if it is being carried to a blockaded port :—

Art. XIII. Sub ejusmodi mercibus prohibitis sive *de Contrebande* minime comprehenduntur triticum, frumentum et alia grana, legumina, olea, vina, sal aut generaliter alia ulla; quæ aliæ omnes res vendibiles atque merces, quæ in præcedenti articulo expressæ non sunt, libertate fruuntur; eritque illorum transportatio, etiam in ipsa loca Coronæ Hispanicæ inimica, excepta Lusitania, prout dictum fuit, et urbibus locisque obsidione cinctis, circumclusis, aut invasis, permissa[42].

[42] The Latin version of this Treaty will be found in Schmauss, Corpus Jur. Gent. Academium, p. 683 ; the French version is in Dumont, Traités, Tom. VI. Pt. II. p. 266 :—

Art. XII. En ce genre de marchandises de contrebande s'entend seulement estre comprises toutes sortes d'Armes à feu, et autres assortissemens d'icelles ; comme canons, mousquets, mortiers, pétards, bombs, grenades, saucisses, cercles poissez, affusts, fourchettes, bandolières, poudres, mesches, salpestre, balles, picques, espées, morions, casques, cuirasses, hallebardes, javelines, chevaux, selles de cheval, fourreaux de pistolets, baudriers, et autres assortissemens servans à l'usage de la Guerre.

Art. XIII. Ne seront compris en ce genre de Marchandises de Contrebande, les fromens, bleds, et autres grains, legumes, huiles, vin, sel, ny généralement tout ce qui appartient à la nourriture et sustentation de la vie ; mais demeureront libres, comme toutes autres marchandises et denrées non comprises en l'article précédent ; et en sera le transport permis, mesme aux lieux ennemis de la Couronne d'Espagne, sauf en Portugal, comme il a été dit, et aux villes et places assiegées, bloquées ou investies.

§ 132. The Dutch were not slow to follow the example of the Hanse Towns, and of Spain, and in 1662 concluded a treaty at Paris, with Louis XIV, whereby they agreed to limit the catalogue of Contraband of War to the articles enumerated in the Treaty of the Pyrenees. England and Sweden on the other hand kept themselves aloof, as they had agreed by a treaty concluded at Whitehall on 21 Oct. 1661, to maintain the more severe rule. It was provided by Art. XI of that Treaty, as follows :—

Treaty of Whitehall in 1661.

Cautum tantummodo sit interim ne merces ullæ vocatæ contrabandæ, et specialiter nec pecunia nec commeatus, nec arma, bombarda cum suis igniariis et aliis ad eas pertinentibus, ignes missiles, pulvis tormentarius, fomites, alias lunten, globi, cuspides, enses, lanceæ, hastæ, bipennes, tormenta, tubi catapultarii, vulgo mortaria, inductiles sclopi, vulgo petardæ, glandes igniariæ, missiles, vulgo granadæ, furcæ sclopetariæ, bandaliers, salpetræ, sclopeti, globuli seu pilæ quæ sclopetis jaculantur, cassides, galeæ, thoraces loricatæ, vulgo cuirasses, et similia armaturæ genera, milites, equi, omnia ad instruendos equos necessaria, sclopethecæ, balthei et quæcunque alia bellica instrumenta, uti nec naves bellicæ et præsidiariæ hostibus suppeditandæ devehantur ad alterius hostes, sine periculo, quod prædæ cedant absque spe restitutionis. Neque confœderatorum alteruter sinat ut suorum cujusquam operâ hostes aut perduelles alterius utantur, navesque vendantur, commodentur, ullove modo usui sint alterutrius hostibus aut perduellibus, ad ejus incommodum aut detrimentum; alterutri autem confœderatorum ejusve populo subditive cum alterius hostibus commercium habere, iisque merces quascunque (de quibus supra exceptum non est,) advehere licebit, idque, sive ullo impedimento, nisi iis in portubus, locisque, qui ab altero obsidentur; quod si acciderit, vel obsessoribus bona sua divendere vel ad alium quemvis portum non obsessum libere se conferre permissum est[43].

It will be observed, however, that whilst these two

[43] Dumont, Traités, Tom. VI. Pt. II. p. 385.

Powers agreed to consider money, provisions, and ships, as prohibited articles, and so far in respect of Contraband of War adhered to the stricter practice, they proposed to adopt a more lenient rule in regard to cargoes going to besieged and blockaded towns, as instead of such cargoes, if captured on their way to such towns, being subject to Confiscation, they were made liable to Preemption only on the part of the captors. The provisions of this Treaty were renewed between Sweden and Great Britain in other treaties of Commerce concluded respectively in 1664, 1665, and 1666[44]. Sweden, however, in the year 1667 concluded a treaty at the Hague (16 July 1667) with the United Provinces, under which, in order to put an end to all controversy as to what merchandise should be regarded as Contraband of War, the two Nations agreed to adopt the catalogue already referred to, as having been introduced by France into her treaties with Spain and the United Provinces[45]. Great Britain very shortly afterwards, by the Treaty of Breda (31 July 1667), entered into the same system of concert as to Contraband of War with the United Provinces, having previously, by the Treaty of Peace and Commerce, concluded with Spain at Madrid, on March 14, 1667, agreed with that Power to adopt the rule of the Treaty of the Pyrenees. At last, by the Treaty of St. Germain en Laye (24 Feb. 1677), Great Britain and France came to a common

Treaties of Breda and Madrid in 1667.

Treaty of St. Germain en Laye of 1677.

44 The Treaties of 1664 and 1665 are referred to in the first article of the Treaty of 1666. Dumont, Traités, Tom. VI. Pt. III. p. 83.

45 Art. III. Ut vero evitentur penitus atque amoveantur controversiæ et disceptationes, quæ ob designandam jam dictam mercem de Contrabanda oriri aliquando possent, convenit utrinque, ac pro re rata habitum est, hoc in numero duci et censeri oportere arma quævis ad vim tam propulsandam quam inferendam apta, præsertim, &c. Schmauss, Corp. Jur. Gent. Acad. p. 891.

understanding on the subject of Contraband in these terms :—

Item. L'on pourra faire trafic pendant la Guerre des mêmes marchandises que l'on peut négocier en temps de Paix à la reserve de celles de Contrebande, qui sont expliquées dans l'article suivant.

Art. III. Les marchandises défendues et de Contrebande sont les canons et leurs assortimens, armes à feu, poudre, mèches, boulets, picques, épées, lances, hallebardes, pertuisannes, bombes, mortiers, pétards, grénades, fourches de mousquets, bandoulières, salpêtres, balles, casques, morions, cuirasses, et autres armes semblables. Est encore prohibé sous le dit nom, le transport de gens de guerre, de chevaux, de harnois, de fourreaux de pistolets, de baudriers, et assortimens façonnez et formez à l'usage de la guerre.

Art. IV. Au nombre de marchandises de contrebande et défendues ne sont comprises les marchandises suivantes : sçavoir, les étoffes et manufactures de laine, lin, soye, coton, et de quelque autre matière que ce soit : toutes sortes d'habits et vestemens, et les étoffes et sortes desquelles on les fait, or et argent monnoyé et non monnoyé, estain, fer, plomb, cuivre, charbon, blez, orges, et autres grains et legumes, tabac, espiceries, chairs salées et fumées, poisson sec et salé, fromage, beurre, bière, huile, vin, sucre, sels, et tout ce qui appartient à la nourriture et sustentation de la vie. Ne seront aussi compris dans les marchandises défendues, les cotons, chanvres, lins, poix, cordages, voiles, anchres, mats, planches, poultres et bois travaillé de toutes espèces d'arbres, et qui peut servir à construire des vaisseaux ou à les radouber ; et demeureront les dites marchandises libres, de même que toutes les autres généralement qui ne sont comprises dans l'article précédent.

Free traffic in all the above articles was secured to the merchants of either Nation, not merely between neutral and enemy ports, but from one enemy port to another enemy port. "Ne pourra néammoins ledit transport être fait aux villes et places assiégées, ou bloquées, ou investies[46]."

[46] Dumont, Traités, Tom. VII. Part I. p. 327.

Treaty of Whitehall of 1689.

§ 133. It will be convenient to notice in the present place the provisions of the Treaty of Whitehall (22 August 1689) concluded between Great Britain and the United Provinces. Lord Liverpool[47] speaks of it as a convention between the two allied Powers "to prohibit totally the commerce of neutral Powers with France;" and Dr. Phillimore[48] condemns it as an attempt to enforce a doctrine, that neutral States are not entitled to carry on, upon their own account, a trade with a belligerent. But this convention, if carefully examined, will be found to be not an agreement between the two Powers to revive the ancient practice, which was fast falling into desuetude, of forbidding by proclamation all commerce whatsoever between neutral merchants and the ports of a belligerent Power, but a compact between the two Powers to establish a blockade of all the ports, harbours, and roadsteads, of the French King[49], and to notify their resolution to all neutral States. It is not surprising that Puffendorf[50] was of opinion that this Convention was justifiable, for under the more lenient practice of the present century a blockade of all the ports, harbours, and roadsteads of the

47 Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. London, 1801, p. 37.

48 Phillimore's Commentaries on International Law, Vol. III. p. 238.

49 "Il est nécessaire qu'on employe toutes ses forces, et particulièrement qu'on passe en sorte que tout commerce et trafficq avec les sujets dudit Roi très Chrétien soit effectivement rompu et interdit, pour ôter au dit Roi et à ses sujets les moyens de fournir à une guerre, qui pourra autrement par sa durée estre très nuisible, et causer une grande effusion du sang Chrestien, et sa dite Majesté de la Grande Bretagne et les dits Seigneurs Estats Généraux ayant pour mieux y parvenir ordonné à leurs flottes de faire voile vers les Costes de France, et *de bloquer tous les Ports, Havres et Rades dudit Roi très Chrétien.*" Dumont, Traités, Tom. VII. Part II. p. 238.

50 See a Letter of Puffendorf, in Groningii Bibliotheca Universalis Librorum Juridicorum, p. 105.

enemy has been maintained by Great Britain against France, and by France and Great Britain against Russia, and by the United States of North America against the Confederate States. Vattel[51], in commenting upon this Treaty, appears not to have fully considered it in its bearing upon the practice of blockade, as maintained by the States General in their Resolutions of 26 June 1630[52], for he speaks of it as if it were simply an agreement between the two Powers to attack every ship bound to or coming from any port of France, and to declare it lawful prize; and when he goes on to say that "Sweden and Denmark, from whom some ships had been taken, entered into a convention on the 17th March 1693, for the purpose of maintaining their rights and procuring just satisfaction, and that Great Britain and the States General, being convinced that the complaints of the two Crowns were well founded, did them justice[53]," he has not weighed carefully the recitals in the Convention which was concluded between the two Baltic Powers on this occasion. It would appear from these recitals that the special grievances, of which the two Baltic Powers complained, were not the capture and condemnation of their vessels bound to or from the ports of the enemy, but the capture of vessels under convoy, and the capture of vessels notwithstanding their passports were in perfect order, and in conformity with the treaty-engagements between the two Baltic Powers and the respective belligerent Powers. It may well have been the fact that Great Britain and the United Provinces, as belligerent allies, were guilty of a breach of their treaty-engagements with the Baltic

[51] Droit des Gens, L. III. c. 7. § 112.

[52] Robinson's Collectanea Maritima, p. 158.

[53] Dumont, Traités, Tom. VII. Part II. p. 325.

Powers in the case of certain vessels which had been captured and condemned contrary to their treaty-engagements, and upon the complaint of the two Crowns did them justice, without the allied Powers being open to the imputation, that, by attempting to prevent all commerce with France, Great Britain and Holland were guilty of a grievous violation of international Law[54].

Opinion of Sir Leoline Jenkins.

§ 134. The state of the question as to Contraband of War at the conclusion of the seventeenth century had been relieved of much ambiguity by the treaties, under which the various Powers of Europe, which had any pretensions to be considered maritime Powers, not merely placed on record their deliberate recognition of a catalogue of contraband articles, but agreed that all other merchandise not comprised in that catalogue, as between the contracting parties, might be freely transported to enemy-ports, except when such ports were besieged or blockaded. We find accordingly that when a Spanish privateer in 1674 seized a Swedish vessel bound to Rouen with a cargo of pitch and tar, the property of a British subject, and the Spanish Admiralty Court was proceeding to condemn the cargo as Contraband of War, Spain being at such time at war with France, Sir Leoline Jenkins gave his opinion to King Charles II, that "there was no pretence to make pitch and tar belonging to British subjects Contraband; these commodities, not being enumerated in the 24th article of the Treaty made between Great Britain and Spain in 1667, are

54 The second article of the Treaty of Whitehall, whereby it was agreed that all vessels captured on their way to French ports, and all vessels laden with merchandise destined to France, wheresoever seized, should be treated by the competent tribunals as prize of war, seems to have been merely a Conventional affirmance of the doctrine, that the inception of a voyage to a blockaded port constituted a breach of the blockade.

consequently declared not to be Contraband in the article next following." Sir Leoline Jenkins then proceeds to consider by what law the question should be decided, in case the benefit of the treaty-engagements between Great Britain[55] and Spain could not be claimed in behalf of British goods laden in a Swedish bottom; and he says, "These goods, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law but by the general Law of Nations; and then I am humbly of opinion, that nothing ought to be judged contraband by that Law in this case, but what is directly and immediately subservient to the uses of war, except in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with." It would appear from the above passage that the opinion of this eminent civilian was, that there were three classes of goods contraband by the Law of Nations. 1. Goods directly and immediately subservient to the purposes of war, if they were being transported over sea to any place within the dominions of the enemy: 2. Goods of all kinds, if they were being carried to a besieged or blockaded town: 3. Goods which the belligerent had, by public notice, forbidden all merchants alike to carry to the enemy, and which, notwithstanding such notice, were being transported over sea to the enemy's country.

Treaty of Utrecht of 1713.

§ 135. The Treaty of Utrecht (11 April 1713) may be considered as the first great international recognition of the more lenient practice, which had been inaugurated by Spain and France at the Peace of the Pyrenees, and to which Great Britain had given in her complete adherence by the Treaty of St. Germain en Laye. The provisions of the latter

55 Life and Correspondence of Sir Leoline Jenkins, Vol. II. p. 751.

Treaty having ceased to be operative by reason of the war of the Spanish succession, the Dutch being in that war the allies of Great Britain and of the Germanic Empire and Portugal, whilst Spain was the ally of France, the links of the European Compact upon the subject of Contraband of War required to be reknit together upon the settlement of Peace. Accordingly, amongst the numerous Treaties concluded at Utrecht on the part of France with the Powers arrayed against her, a Treaty of Navigation and Commerce with England will be found, in which the question of contraband and free goods was dealt with in a still more explicit manner than in the previous Treaty of 1677 :—

Art. XVIII. This liberty of Navigation and Commerce shall extend to all kind of Merchandises, excepting those only which follow in the next Article, and which are signified by the name of Contraband.

Art. XIX. Under this name of Contraband or Prohibited Goods, shall be comprehended Arms, great Guns, Bombs, with their Fusees, and other things belonging to them, Fire Balls, Gunpowder, Match, Cannon Ball, Pikes, Swords, Lances, Spears, Halberds, Mortars, Petardes, Granadoes, Saltpetre, Muskets, Musket Ball, Helmets, Head Pieces, Breast Plates, Coats of Mail and the like kinds of Arms proper for arming Soldiers, Musket rests, Belts, Horses with their Furniture, and all other Warlike Instruments whatever.

Art. XX. These Merchandises which follow shall not be reckoned among prohibited Goods, that is to say, all sorts of Cloaths and all other Manufactures woven of any Wooll, Flax, Silk, Cotton, or any other Materials whatever, all kinds of Cloathes and Wearing Apparel, together with the Species whereof they are used to be made, Gold and Silver as well coined as uncoined, Tin, Iron, Lead, Copper, Brass, Coals[55], as also Wheat and Barley and any other kind of Corn, and Pulse, Tobacco, and likewise all manner of Spices, Salted and Smoked Flesh, Salted Fish, Cheese and Butter, Beer, Oils,

55 Carbones Focarii. Schmauss. Corp. Jur. Gent. Acad. p. 1344.

Wines, Sugars, and all sorts of Salt, and in general all Provisions which serve for the Nourishment of Mankind and the Sustenance of Life. Furthermore all kinds of Cotton, Hemp, Flax, Tar, Pitch, Ropes, Cables, Sails, Sail Cloths, Anchors and any parts of Anchors, all Ship Masts, Planks, Boards and Beams of what Trees soever and all other things proper either for Building or Repairing Ships, and all other Goods whatever which have not been worked into the Form of any Instrument or thing prepared for War by Land or by Sea, shall not be reputed Contraband, much less such as have been already wrought and made up for any use, all which shall wholly be reckoned among free Goods, as likewise all other Merchandises and Things which are not comprehended and particularly mentioned in the preceding Article, so that they may be transported and carried in the freest manner by the Subjects of both Confederates even to places belonging to an Enemy, such Towns and Places being only excepted as are at that time besieged, blocked up round about, or invested[56].

British Treaty-engagements.

§ 136. The provisions in the Treaty of Utrecht were renewed almost in identical language in the Treaty of Navigation and Commerce concluded between Great Britain and France at Versailles on 26 Sept. 1786[57]. The engagements however of this Treaty were terminated by the war of the French Revolution, it being the rule of Great Britain to regard all treaty-privileges as annulled by the outbreak of war between the contracting parties; and any difficulty in observing this rule, which might have been raised by the dethronement of the Bourbon Dynasty, was removed by the Decree of the French Convention published on 1 March 1793, whereby it declared that "all treaties of alliance or of commerce existing between the former French Government and the Powers with whom the Republic is at war, are annulled." No subsequent treaty on the subject of

[56] This English version of the Treaty of Commerce and Navigation is copied from the Compleat History of the Treaty of Utrecht, London, 1715. Vol. I. p. 131.

[57] Martens, Récueil de Traités, IV. p. 169.

Contraband of War has ever been concluded between France and Great Britain. With regard to Spain and Great Britain, the Treaty of 1667 was confirmed and inserted word for word in the Treaty of Navigation and Commerce signed at Utrecht 9 Dec. 1713; which was renewed and confirmed by the Treaty of Versailles of 3 Sept. 1783; and by the first additional article of the Treaty of Madrid, signed on 28 Aug. 1814, all the Treaties of Commerce which subsisted between the two Nations previously to the year 1796 were ratified and confirmed[58]. It would appear therefore that the provisions of the 24th and 25th articles of the Treaty of 1667 as to contraband and free merchandise are still in force[59]. With regard to Sweden and Great Britain, the provisions of the Treaty of Whitehall (21 Oct. 1661) are still in force, having been renewed by the second article of the Treaty of Orebro (18 July 1812[60].) With regard to Denmark and Great Britain, the Treaty of 1670 with the explanatory article of 4 July 1780 as to contraband and free merchandise, was renewed by the seventh article of the Treaty of Kiel (14 Jan. 1814), and is still in force[61]. With regard to Portugal and Great Britain, the Treaty of Rio Janeiro, 19 Feb. 1810, appears to have been the first and last Treaty in which the two Nations came to a common agreement on the subject of Contraband. By this Treaty, Great Britain and Portugal agreed to regard as Contraband not merely the articles included in the Catalogue of the Treaty of the Pyrenees, but generally all other articles that may have been specified as

[58] Hertslet, Vol. II. p. 271. Martens, N. R. IV. p. 123.

[59] Mr. Manning, in his Commentaries on the Law of Nations, p. 305, considers that there are no Treaties in force between Great Britain and Spain on the subject of Contraband.

[60] Hertslet's Treaties, Vol. II. p. 337.

[61] Hertslet, Vol. I. p. 229.

Contraband in any former Treaties concluded by Great Britain or by Portugal with other Powers: but this Treaty ceased to be in vigour after 30 April 1836, by virtue of a notification made, on the part of Great Britain, in pursuance of the provisions of the 33d article[62]; and no provision has been made on the subject of Contraband of War in the subsequent Treaty of Commerce concluded between Great Britain and Portugal on 3 July 1842[63]. The Treaties between Great Britain and the United Provinces have not been renewed with the Netherlands, nor have the Treaties on the subject of Contraband, which formerly existed between Great Britain and Russia, been renewed, for all that was provided by the Treaty of Peace between Great Britain and Russia, signed at Orebro[64] on 18 July 1812, was that the relations of friendship and commerce between the two countries shall be reestablished on both sides upon the footing of the most favoured Nations. The Treaty of Orebro was determined by the war of 1854–56; but there was a provision in the 32d article of the Treaty of Paris[65] (30 March 1856), by which the commerce of the subjects of the contracting parties was reestablished on the footing of the treaty-engagements in vigour before the war, until they should be renewed or replaced by new Acts, and the subjects of all the contracting parties in all other matters were to be treated on the footing of the most favoured Nation[66]. A subsequent

[62] Hertslet, IV. p. 362. V. p. 413.

[63] Ibid. VI. p. 598.

[64] Ibid. II. p 128. Martens, N. R. III. p. 226.

[65] Martens, N. R. Gén. XV. p. 780.

[66] It was held by the English Court of Admiralty in the case of the Quatre Frères 27 Nov. 1778, (Hay and Marriott's Reports, p. 171.) that the Treaty of Copenhagen, Art. XL. (11 July 1670) did not give to the Danes the privilege of Free Ship Free Cargo in time of war, which was

Treaty[67] of Commerce and Navigation between Great Britain and Russia was signed at St. Petersburg on 2 Jan. 1858, which is silent on the subject of Contraband of War.

Concert of European Nations as to certain articles.

§ 137. It deserves to be remarked, that the list of contraband articles adopted in the Treaty of St. Petersburg[68], concluded between Russia and Great Britain on 20 June 1766, is less extensive than the catalogue of the Treaty of the Pyrenees; and that Russia, Spain, France, Prussia, Austria, Sweden, Denmark, Holland, and Sardinia, have all at various times concurred in declaring the articles included in that list to be Contraband of War according to Natural Law. The list is as follows:—

Art. XI.[69] Tous les canons, mortiers, armes à feu, pistolets, bombes, grénades, boulets, balles, fusils, pièrres à feu, mèches, poudre, salpêtre, souffre, cuirasses, piques, épées, ceinturons, poches-à-cartouche, selles et brides, au-delà de la quantité qui peut être nécessaire pour l'usage du vaisseau, ou au delà de celle qui doit avoir chaque homme servant sur le vaisseau ou passager, sera reputés munitions ou provisions de guerre, et s'il s'en trouve, ils seront confisqués selon les loix, comme contrebande ou effets prohibés. Mais ni les vaisseaux, ni les passagers, ni les autres marchandises, qui s'y trouveront en

granted by Great Britain to the Dutch in the Treaty of 1674. The words of the 40th Article were, "If the Hollanders or any other Nation whatever have, or shall obtain from his Majesty of Great Britain any better articles, agreements, exemptions, or privileges, than what are contained in this Treaty, the same like privileges shall be granted to the King of Denmark and his subjects also, in a most full and effectual manner." According to this decision, "the most favoured Nation clause" must, unless otherwise specified, be limited in its operation to commercial privileges in time of peace; which seems to be a reasonable construction of it.

[67] Martens, N. R. Général, XVI. p. 490.

[68] Martens, R. I. p. 395. The provisions of this Treaty on the subject of Contraband were renewed in the Treaty of 1797, (Martens, R. VI. p. 362,) and recognised in the Treaty of 1801, (Martens, R. VII. p. 262.)

[69] Martens, Récueil, I. p. 395.

même temps, ne seront point détenus, ni empêchés de continuer leur voyage.

One result of the Armed Neutrality of 1780 was to lay the foundation of a Common Concert amongst the Continental Powers on the subject of Contraband of War, although such concert could only take effect amongst the Powers which were parties to the Treaties and Declarations[70]; for it was not attempted on occasion of either of the Armed Neutralities of 1780 or 1800 to set aside the treaty-engagements as to Contraband of War, which existed between the Powers, which were parties to either Armed Neutrality, respectively and Great Britain; on the contrary, there were express stipulations that in the matter of Contraband, each State should adhere to its existing engagements with other States. It is consistent therefore with the Custom of contracting which prevails amongst the European Powers, that the same Nation should have different Conventions on the subject of Contraband of War with different Nations. "Hence it arises, that the catalogue of Contraband has varied very much," as observed by Lord Stowell, "and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions[71]."

§ 138. The opinion of Grotius has already been referred to upon the question, what we may lawfully do to those who are not our enemies and yet supply our enemies with certain things[72]. Bynkershoek, in considering the same question at the interval of more

Bynkershoek's view.

[70] The Declarations of Prussia on the subject of Contraband of War will be found in Martens, III. p. 247; and that of Austria in Martens, III. p. 258.

[71] The Jonge Margaretha, 1 Ch. Robinson, p. 192.

[72] Supr. 128.

than a century[73], questions the opinion of Grotius, that there is "an intermediate class of articles of promiscuous use, which a belligerent may intercept on their way to his enemy, if he cannot defend himself except by intercepting them, under the obligation of making restitution," on the ground that no belligerent can be expected to judge equitably between himself and a neutral merchant as to the existence of such necessity, as will warrant him in intercepting the goods of the latter, whilst the practice of Nations does not affirm any such distinction. Bynkershoek contends that there is a Common Law of Nations, founded upon reason and usage, and that whilst reason suggests that we should be friends in an equal manner to our friends, although they should be enemies to each other, the Usage of Nations in such matters may be gathered from the perpetual tenor of the conventions and declarations of Sovereign Princes. "Dixi," he says, "ex perpetua quodammodo consuetudine, quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat[74]." But Bynkershoek, in discussing the practice of Holland, justifies an Edict of the States General, published on 31 Dec. 1657, during a war with the Portuguese; by which, after forbidding articles Contraband of War to be carried to Portuguese ports, they go on to prohibit ship timber and naval stores being conveyed to Portugal, on the ground that they had nothing to fear from the Portuguese except by sea, and that the Portuguese could not carry on the war without supplies of ship timber. He justifies with equal inconsistency analogous Edicts published by the Dutch on 5 Dec. 1652 against the British, and

73 Bynkershoek's Quæstiones Juris Publici were published in 1737.
74 Quæstiones Juris Publici, L. I. c. 10.

on 9 March 1689 against the French. He cites these Edicts indeed as exceptions which prove the rule, on the ground that the Dutch, having forbidden all trade in Contraband of War *generally*, go on to forbid these articles *specially* to be carried by neutrals to the enemy's country. But in thus citing the practice of the Dutch, he holds it to be lawful for a belligerent, under special circumstances, to forbid other articles besides what are Contraband of War to be carried to the enemy; and he accordingly admits a class of things, which if not at all times Contraband, may become Contraband under circumstances. There would thus seem to be no substantial difference between the views of Bynkershoek and those which Grotius advocated.

Vattel.

§ 139. Vattel[75], on the other hand, having stated that neutral Nations ought to enjoy perfect liberty to trade in ordinary goods which have no relation to war, as the belligerent is not authorised by the care of his own safety or the necessity of self defence to prevent the importation of such goods into the enemy's country, goes on to say, that "commodities particularly useful in war, and the importation of which to an enemy is prohibited, are called Contraband goods. Such are arms, ammunition, timber for shipbuilding, every kind of naval stores, horses, and raw provisions in certain junctures, when we have hopes of reducing the enemy by famine." It will be seen from the above passage that Vattel holds that a belligerent may rightfully prohibit a neutral to carry to the enemy anything which may be useful to him in war, and that all articles so prohibited become Contraband of War.

Italian and Spanish Jurists.

§ 140. Italian jurists, such as Lampredi and Azuni, recognise no other source of law as to Contraband of

75 Droit des Gens, L. III. c. 7. § 112.

War than the treaty-engagements of particular Nations, coupled with the usage of other Nations, conforming themselves by Comity to the practice of those particular Nations under their treaty-engagements.

D'Abreu, on the other hand, and other Spanish authors, agree that neutrals are prohibited by every kind of law from carrying munitions of war to the enemy's country, and that a belligerent does only what is his Right in capturing such articles on their way to the enemy's ports; but they hold that a neutral may rightfully carry provisions to any but besieged or blockaded places: and in support of this latter position D'Abreu refers to the Treaty of 1650, concluded with the Dutch, the Treaty of 1667 concluded with the English, and the Treaty of Commerce concluded with the Emperor in 1725. "From what we have said," he concludes, "it follows that a belligerent may justly capture vessels which are conveying arms and munitions of war to the enemy, and that those vessels which convey provisions to them, ought to be protected from violence, excepting when such provisions are being conveyed to a besieged or blockaded place[76]."

French Jurists.

§ 141. Valin, amongst the older French writers, holds that provisions are not Contraband of War by the Law of Nations, except they are being carried to besieged or blockaded places; but he admits that naval stores have by the usage of Nations come to be regarded as Contraband, and that munitions of war may be rightfully captured by a belligerent under any circumstances, if they are being carried to the dominions of the enemy. Amongst the more recent French writers who have treated professedly of Neutral Commerce in time of war, M. de Hautefeuille occupies a

[76] Tratado Juridico-Politico sobre Pressas de Mar, Cap. 11. § 15. D'Abreu expressly bases his opinion as to provisions upon the treaties between Spain and various European Powers.

more advanced position than Valin was content to take up, in restraining the exercise of belligerent right, when he maintains that there is only one class of articles which are properly Contraband of War; namely, objects which are both necessary and exclusively useful for belligerent purposes, and which are directly available for such purposes without undergoing any change. He excludes naval stores altogether from the list of contraband[77]. M. Ortolan[78], on the other hand, holds that munitions of war and supplies of all sorts, which serve directly and exclusively for the purposes of war, are absolutely and necessarily Contraband of War, whilst other articles, which are useful in peace but can also be adapted to the purposes of war, may, under particular circumstances, be declared Contraband; on the other hand he maintains that provisions can never be considered Contraband of War, unless they are being carried to a blockaded place. With regard to the catalogue of Contraband articles, M. Ortolan considers that the list must necessarily vary with the application of science to the purposes of war. In this respect he agrees with Lord Erskine, who, in the course of the debate in the House of Lords, on the Orders in Council issued in 1808, observed, that the King may make new declarations of Contraband, when articles come into use as implements of war, which were before innocent; this is not the exercise of discretion over Contraband; the Law of Nations prohibits Contraband, and it is the *usus bellici* which, shifting from time to time, make the law shift with them[79].

§ 142. In the conflict of authority among text- Practice of British Prize Courts.

77 Des Droits et Des Devoirs des Nations Neutres, Tit. VIII. § 5. Art. 4.

78 Diplomatie de la Mer, L. III. c. 6.

79 Lord Erskine's Speech on March 8, 1808. 10 Cobbett's Parliamentary Debates, p. 958.

writers, and amidst the fluctuations of practice amongst Nations, the British Courts of Admiralty, in adjudicating upon questions of Contraband of War, have endeavoured, in cases where there have been no treaty engagements on the subject, to pursue a system which should recommend itself to the approval of mankind by its accordance with Reason and by its moderation. They have not hesitated to maintain the doctrine of Conditional Contraband; but they have modified the penalty, when the cargoes have been the produce of the country from which they were exported, and have been staple articles of its commerce. "In the practice of this Court," says Lord Stowell, "there is a relaxation which allows the carrying of these articles (pitch and tar), being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition that it may be brought in not for Confiscation, but for Preemption, no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self defence, and the claims of the neutral to export his native commodities, although immediately subservient to the purposes of hostility[80]. Again, British Courts have shown indulgence to articles, which are in their native and unmanufactured state. Thus, unwrought iron has been treated with lenience, whilst anchors and other instruments fabricated out of it have been confiscated. Hemp has been more favourably considered than cordage, and wheat than the final preparations of it for human use[81]. Further, they have allowed the particular

80 The Sarah Christina, 1 Ch. Rob. p. 241.

81 The Jonge Margaretha, 1 Ch. Rob. p. 194; ibid. p. 195.

destination of the ship to be taken into account to rebut the presumption of the articles in question being destined for belligerent purposes; and in the case of ship-timber have made a distinction, according as the particular destination of the vessel was to a port of general commerce, or a port of naval armament. In these and other cases whilst the Prize Courts have not hesitated to maintain the extreme right of a belligerent to prohibit all trade with the enemy, which is calculated, under circumstances, to subserve the purposes of war, they have allowed equitable deductions to be made from the exercise of that right, wherever the *bona fides* of the neutral trader, or the innocuous character of the actual trade itself, was capable of being established.

Difficulty of specifying articles conditionally contraband.

§ 143. The expression "*conditional Contraband*" has been designedly used in the preceding passage to mark the contrast with "*absolute Contraband*" of War. The term "conditional Contraband" is intended to denote such articles as are *ancipitis usûs*, and accordingly are not always, but only under certain conditions, unlawful merchandise for neutrals to carry to an enemy. Certain Publicists, in discussing the unsettled character of the conditions, under which certain articles may be free at one time, and at another time unfree, for neutrals to convey to the enemy's country, have expressed an opinion that it would be desirable, if Nations would settle by some common compact, what articles to the exclusion of all other articles shall be deemed Contraband of War. It is obvious, however, that the necessities of a Continental Power in time of war may not be the same with the necessities of an Insular Power: for instance, horses may be necessary to enable an army to move by land, whilst naval stores will be necessary

to enable a navy to move by sea. Horses[82] may accordingly be prohibited with justice to be conveyed by a neutral merchant to the ports of a Continental Power, whilst naval stores may by parity of reason be with justice prohibited to be carried to the country of an Insular Power. On the other hand, horses will be useless appendages to a fleet, whilst naval stores will be equally unserviceable to land forces. There are without doubt certain articles, which all Nations have agreed in practice to regard as unlawful for neutral merchants to convey by sea to the dominions of a belligerent Power, and such articles, if captured upon their voyage, are by all Courts declared to be lawful Prize of War to the captors. If however it should be desirable in the interests of International Commerce, that some attempt should be made to render the law of *conditional Contraband* less vague, the opinion, which Sir Leoline Jenkins submitted to King Charles II, in regard to a cargo of pitch and tar, which had been captured and confiscated by the Spaniards, may be worthy of attention. "Nothing," said that eminent civilian, "ought to be judged contraband by the Law of Nations, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places, or of a general Notification made by Spain to all the world, that they will condemn all the Pitch and Tar they meet with." If a Belligerent Power at the commencement of a war should notify to all Neutral Powers what are the articles of ambiguous use *(ancipitis usûs)* which it intends to confiscate, if they should be intercepted by its cruisers in the course of transport on the High Seas to the enemy's dominions, neutral merchants would have a warning

[82] Russia has never allowed horses to be enumerated in the list of Contraband in any of her treaty-engagements.

analogous to that, which is conveyed to them by the Notification of a blockade, after which Notification a belligerent Power is held to be entitled by the Law of Nations to capture and confiscate all vessels and cargoes, which attempt to trade with a blockaded port. As an instance however of the difficulties which are in the way of Nations coming to any common agreement, as to what articles shall be conditionally Contraband of War, Mr. Robert Ward refers to the case of Bulls' Hides, as being goods "which are in themselves seemingly a very innocent article of traffic, and in the American war Neutrals might, for a long time, have been safely permitted to supply them to Spain. But when the floating batteries, destined for the destruction of Gibraltar, were fitting at Algeziras, and it was known that Hides were to be the chief article of defence to be used in that famous attack, I have no doubt that a ship loaded with Hides, and destined for that port of equipment, with a knowledge that they were then wanted, might very justly have been stopped, and even confiscated[83]."

General doctrine of British Prize tribunals.

§ 144. The general doctrine of the British Prize Courts on the subject of Contraband of War is to be gathered from the decisions of those Courts during the wars of the first French Revolution. In the recent war of 1854-56 with Russia there was hardly any occasion for the subject of Contraband of War to be discussed in any British Court, seeing that the Allied Powers placed all the ports and coasts of Russia both in the Baltic and in the Black sea under Blockade, and the proceedings in the British Prize Courts were instituted for the most part in cases of neutral commerce, to punish attempts to

[83] Ward's Essay on Contraband, London, 1801, p. 248.

violate the Blockade. The British Courts of Prize have however invariably confiscated all instruments and munitions of war, under which head are embraced all kinds of cannon and guns with their appurtenances, such as ammunition and carriages, arms of every description, and all military equipments and military clothing. To these may be added articles in a natural or imperfectly prepared state, which are used almost exclusively for purposes of war, such as saltpetre and sulphur suitable for making gunpowder, and all kinds of machinery for manufacturing arms or ammunition. In addition to these articles the British Courts have condemned vessels[84] evidently built for warlike purposes, such as gunboats and mortar-boats destined to be sold to the enemy, and all kinds of articles which are not in their native and unmanufactured state, and which are fitted for the building and equipment of ships of war, such for instance as masts, spars, rudders, sails, sail-cloth[85], cordage, rigging, anchors[86], and sheet-copper[87]. Articles on the other hand which are susceptible of being used for military and naval purposes, but are in a native and unmanufactured state, have been dealt with by the Courts as articles of equivocal use, which may or may not be condemned as Prize of War, according to the character of the port from which they are exported, and of the port to which they are bound. If they are for instance the produce of the country from which they are exported,

[84] The Brutus before the Lords 27 July 1804, cited in Appendix to 5 Ch. Rob. p. 408. The Richmond, 5 Ch. Rob. p. 325.

[85] The Neptunus, 3 Ch. Rob. p. 108.

[86] The Stadt Embden, 1 Ch. Rob. p. 29.

[87] The Charlotte, 5 Ch. Rob. p. 277. Sheet-copper was enumerated amongst articles of contraband "serving directly to the equipment of vessels" in article 10 of the treaty of 1794 between Great Britain and the United States.

and are the property of its subjects or citizens, and are staple articles of its commerce in time of peace, they have not been condemned as unlawful articles of neutral trade, except when the ship has been bound to a port of military or naval armament. Thus pitch[88] and tar, hemp[89], rosin[90], ship timber in balk[91], planks, unwrought iron[92], and other articles, have been under such circumstances treated with leniency. So likewise provisions have been held by Sir William Scott to be generally not Contraband, for instance in the case where they were the growth of the country from which they were exported[93], and not bound to a port of naval equipment; but all articles of human food have been held to be Contraband, when it was probable that they were intended for naval or military use. Thus corn, flour, meal, rice, sea-biscuits, salt, salt fish, wine, brandy, butter, cheese, have been condemned as Contraband of War, when destined to a port of naval equipment[94], unless it has been established that the articles were from their superior quality not adapted for naval use, but were merely luxuries for the service of domestic tables[95].

The doctrine of the British Prize Courts on the subject of provisions being conditionally Contraband of War, was approved by the United States in Congress[96] in 1775, when they declared that all

88 The Sarah Christina, 1 Ch. Rob. p. 241.

89 The Apollo, 4 Ch. Rob. p. 158.

90 Nostra Signora de Begona, 5 Ch. Rob. p. 98.

91 The Twende Brodre, 4 Ch. Rob. p. 33.

92 The Ringende, Jacob, 1 Ch. Rob. p. 89.

93 The Jonge Margaretha, 1 Ch. Rob. p. 194. The Apollo, 4 Ch. Rob. p. 158.

94 Cheeses were condemned in the Zelden Rust, 6 Ch. Rob. p. 93. The Frau Margaretha, Ibid. p. 92. Biscuits were condemned in the Ranger, 6 Ch. Rob. p. 125. Wines in the Edward, 4 Ch. Rob. p. 68.

95 The Weelvaart, 25 August 1799, cited in note 1 Ch. Rob. p. 195.

96 Journals of Congress, Vol. I. p. 241. Kent's Commentaries of American Law, Vol. I. p. 140.

vessels to whomsoever belonging, carrying provisions or other necessaries to the British army or navy within the Colonies, should be liable to seizure and confiscation. They have also been adopted to the fullest extent by the Courts[97] of the United States; and it may well be doubted whether, in the case of the Commercen, those Courts have not gone beyond any precedent furnished by the Prize Courts of Great Britain. In the case of the Commercen, a Swedish vessel was carrying a cargo of provisions the property of English merchants to a Spanish port, there to be delivered to the Commissary of the British army engaged in hostilities against France in Spain. Great Britain was at such time at war with the United States, and also at war with France; but there was no alliance or common action between France and the United States. Sweden and Spain, on the other hand, were the allies of Great Britain in the war against France; but were neutral in the war against the United States. The cargo was condemned as enemy's property, but the ship was released, and in the District Court of Maine freight was allowed according to the rule of the Consolato del Mare and the ancient practice in cases, where enemy's goods are captured on board a neutral vessel. But Mr. Justice Story, in the Circuit Court of the United States[98], reversed the judgment of the Court below, so far as it allowed freight, and held that although strictly speaking it was not a question of Contraband, for that can arise only when the property belongs to a neutral, and in this case the property belonged to an enemy, yet that the shipowner, in carrying provisions for public use, and under a public contract, was assisting the military operations of the

97 Maisonnaire et al. *v.* Keating, 1 Gallison, p. 325.

98 The Commercen, 1 Gallison, p. 260.

enemy. He pronounced accordingly the voyage to be illicit, and inconsistent with the duties of neutrality equally as the carrying of the enemy's despatches, or the conveyance of military personages in his employ. The Supreme Court of the United States affirmed this judgment by a majority of four against three Judges, Mr. Justice Story himself forming one of the majority, and Chief Justice Marshall being in the minority. The latter eminent Judge was of opinion, that "a remote and consequential effect of an act was not sufficient to give it a hostile character; its tendency to aid the enemy in the war must be direct and immediate. It is also necessary that it should be injurious to us; for a mere benefit to another, which is not injurious to us, cannot turn a friend into an enemy[99]." Mr. Justice Livingstone and Mr. Justice Johnson concurred with the Chief Justice, that "Sweden, being the ally of Great Britain in the Peninsular war, her subjects had an indubitable right to transport provisions in aid of their Nation, or its allies. The owner therefore had a right to his freight; for he did no act inconsistent with our belligerent rights, while in the direct and ordinary exercise of those rights, which a state of war conferred on himself."

British Treaty with United States in 1796.

§ 145. The distinction between *absolute Contraband* of War and *conditional Contraband* of War has been fully recognised in the first Treaty of Commerce concluded between Great Britain and the United States on 4 Nov. 1796[100]. The list of absolute Contraband is worthy of note, as the same list, with a slight variation, has been adopted in the Treaty of Commerce concluded between Great Britain and Brazil on 17 Aug. 1827[101].

99 1 Wheaton, p. 382. 100 Martens, Récueil, V. p. 674.
101 Martens, N. R. VII. p. 479.

Art. XVIII. In order to regulate what is in future to be deemed Contraband of War, it is agreed, that under the said denomination shall be comprised all arms and implements serving for the purposes of war by land or by sea, such as cannon, muskets, mortars, petards, bombs, grenadoes, carcasses, saucisses, carriages for cannon, musket rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, headpieces, cuirasses, halberts, lances, javelins, horse furniture, holsters, belts, and generally all other implements of war; as also timber for ship-building, tar or rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly for the equipment of vessels, unwrought iron and fir planks only excepted; and all the above articles are hereby declared to be just objects of Contraband, whenever they are attempted to be carried to an enemy.

The variation, which is found in the Treaty of Great Britain with Brazil, consists in the substitution of the words "whatsoever may serve directly to the equipment *of vessels of war*," in lieu of the words "whatever may serve directly to the equipment of vessels." The concluding portion of the same article of the Treaty between Great Britain and the United States recognises provisions and other articles, as Contraband of War in certain cases according to the existing Law of Nations. "And whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles not generally Contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so becoming Contraband according to the existing Law of Nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified, and the captors, or in their default the Government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mer-

cantile profit thereon, together with the freight and also the demurrage incident to such detention."

§ 146. The Right of Preemption (*droit d'achat*) is considered by Sir William Scott to be a belligerent right under the Law of Nations, irrespectively of any Convention to that effect. "The right of taking possession of cargoes of this description, *commeatus* or provisions going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent Nations. The ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely: a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times, of holding such cargoes subject only to a right of Preemption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected on just grounds to have a concealed destination of that kind, or that, on the side of the neutral the same exact compensation is to be expected, which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, or may be driven by his necessities to pay a famine price for the commodity, if it gets there; it does not follow that acting on my Rights of War, in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened: it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid

Right of Preemption.

by the exporter and the expense which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms. But certainly the capturing Nation does not always take these cargoes on the same terms, on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorised exercises of the rights of war[1]." The same learned Judge in dealing with the case of a Swedish ship carrying pitch and tar to a French port, the cargo of which he condemned by reason of there being false cargo-papers on board setting up a pretended neutral destination, observed, "In the practice of this Court there is a relaxation which allows the carrying of these articles (pitch and tar), being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent Right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition, that it may be brought in, not for Confiscation, but for Preemption; no unfair compromise, as it should seem, between the belligerent's Rights, founded on the necessities of self defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility. To entitle the party to the benefit of this rule, a perfect *bona fides* on his part is required[2]."

The option of a sale to the belligerent had been made a treaty-privilege between Sweden and Great

[1] The Haabet, 2 Ch. Rob. p. 183, 30 August 1800.

[2] The Sarah Christina, 1 Ch. Rob. p. 241, 6 March 1799.

Britain in certain cases by the Treaty of Westminster, concluded on 17 July 1656[3], which treaty, after enumerating what goods and merchandise should thereafter be declared contraband and prohibited, goes on by the third Article to provide as follows: "But it shall be lawful for either of the Confederates and his people and subjects to trade with the enemies of the other, and to carry to them any goods whatever, which are not excepted as above, without any impediment; provided they are not carried to those ports or places which are besieged by the other, in which case they shall have leave either to sell their goods to the besiegers, or to repair with them to any other port which is not besieged." In the subsequent Treaty of Whitehall[4] 21 October 1661, in which a more extensive list of Contraband articles was set forth, the language of the treaty-privilege was slightly varied, it being provided that "it shall be lawful for either Confederate, his people, and subjects, to have commerce with the enemies of the other, and to carry to them all kinds of merchandise, not before excepted, without any let or hinderance, unless it be to such ports and places as are besieged by the other, and in such case it shall be lawful for them to sell their commodities to the besiegers, or otherwise to betake themselves to any other port which is not besieged." But as it had been specified in the earlier part of the same article of that Treaty[5] that neither of the Con-

Treaty of Westminster of 1656.

Treaty of Whitehall of 1661.

3 Hertslet, II. p. 317. It appears from Whitelocke's Memorials, p. 645, that the Latin Articles of this Treaty were drawn up by John Milton, as the Swedish Ambassador complained of the delay in translating them, and of their having been sent to one Mr. Milton, a blind man, to put them into Latin.

4 Hertslet, Vol. II. p. 324. Dumont, Traités, Tom. VI. Part II. p. 384.

5 Art. XI. Although in the preceding Articles of the present Treaty it be forbidden to either Confederate to yield any aid or assistance to the enemies of the other, yet it is not to be so understood, as if either Confederate,

federates should suffer any of his subjects to give aid, sell or lend ships, or be in any way useful to the enemy or rebels of the other, to his prejudice or detriment, the British Government contended that the prohibition to give aid, sell or lend ships, or be in any way useful to the enemy, carried with it by implication a prohibition to supply the enemy with the necessaries for building ships, and consequently that pitch and tar were virtually made Contraband of War under this treaty[6]." The English Court of

having no war with the enemies of the other, might not sail to or traffic with the said enemies, notwithstanding that the other Confederate be in actual war with them. But it is only provided that "no goods, called goods of Contraband, and particularly that no money, provision, weapons, fire-arms with their appurtenances, fire-balls, gunpowder, match, bullets, spear-heads, swords, lances, pikes, halberts, ordnance, mortar-pieces, petards, grenadoes, rests, bandeliers, saltpetre, pistols, small shot, pots, head-pieces, backs and breasts, or such kinds of armour; soldiers, horses, all furniture necessary for horses, holsters, belts, and whatsoever warlike instruments; and also that no ships of war or convoys be furnished to the enemy, without peril, in case they be taken, of being adjudged lawful prize without hope of restitution. And neither of the Confederates shall suffer any of his subjects to give aid, sell or lend ships, or be any way useful to the enemies or rebels of the other to his prejudice or detriment; but it shall be lawful for either Confederate, his people and subjects, to have commerce with the enemies of the other, and to carry to them all kind of merchandise not before excepted, without any let or hinderance, unless it be into such ports and places as are besieged by the other, and in such case it shall be lawful for them to sell their commodities to the besiegers, or otherwise to betake themselves to any other port, which is not besieged." Hertslet, II. p. 329.

[6] The doctrine of Contraband by implication was upheld by Sir Robert Wiseman, the King's Advocate General, in certain positions of International Law which he drew up on 23 May 1672, and in which he says, "Setting aside what are by treaties agreed to be Contraband, which must be so esteemed, whatsoever they be, and no other, I also agree that iron, pitch, tar, hemp, clypebard, plancks, excepting wainscott, corn, wine, oyle, salt, will be accounted Contraband, under which all such things which are of a general use of furnishing the war and those that are in arms are properly comprehended." The positions of Sir R. Wiseman, fifteen in number, are set forth at length in Dr. Pratt's work on Contraband of War, p. 255. The author has a copy of them in his possession in a MS. book of Sir Nathaniel Lloyd, Queen's Advocate-General in 1710.

Admiralty, in adjudicating upon such commodities laden in Swedish bottoms, captured on their way to an enemy's port, considered them to be entitled to the benefit of the more favourable rule, and held them, if taken when avowedly going to the enemy, to be brought in for Preemption, not for Confiscation: nevertheless it was thought advisable by the Swedish and British Governments, after the second Armed Neutrality, to make this more favourable rule a matter of treaty-engagement between the two Powers; and accordingly a Convention was concluded at London on 25 July 1803 between Great Britain and Sweden, with a view, as averred in the preamble, to prevent the recurrence of the differences which had previously arisen in relation to the 11th Article of the Treaty of Whitehall (21 Oct. 1661). By the second Article of this Convention it was provided as follows:—

Les croiseurs de la Puissance bélligerante exerceront le droit de détenir les bâtimens de la Puissance neutre, allants aux ports de l'ennemi avec des chargemens de provisions et de poix, résine, goudron, chanvre, et généralement tous les articles non manufacturés, servant à l'équipement des bâtimens de toutes dimensions, et également tous les articles manufacturés servant à l'équipement des bâtimens marchands (le hareng, fer en barres, acier, cuivre rouge, laiton, fil de laiton, planches et madriers, hors ceux de chêne et esparres, pourtant exceptés); et si les chargemens, ainsi exportés par les bâtimens de la Puissance neutre, sont du produit du territoire de cette Puissance, et allant pour compte de ses sujets, la Puissance belligérante exercera dans ce cas le droit d'achat sous la condition de payer un bénéfice de dix pour cent sur le prix de la facture du chargement fidèlement déclaré, ou du vrai taux du marché, soit en Suède, soit en Angleterre, au choix du propriétaire, et en outre une indemnité pour la détention et les dépenses nécessaires[7].

7 Martens, Récueil, VIII. p. 92. This Treaty received a judicial exposition from Lord Stowell, in the case of the Zacheman, 1 May 1804. 5 Ch. Robinson, p. 152.

Treaty of Orebro of 1812.

This Convention appears not to have been renewed by the Treaty of Orebro in 1812[8], as that treaty re-established relations of amity and commerce between the two Crowns, upon the footing on which they existed on 1 January 1791, and all treaties and conventions existing at that time. The more rigorous system, which was founded on the Treaty of 1661, would therefore seem to be revived between the two Nations.

§ 147. It appears that pitch and tar and hemp have been at times omitted from the catalogue of Contraband of War in treaties of commerce where the restriction upon neutral trade resulting from such commodities, being regarded as Contraband, would not have been attended with mutual inconvenience to both of the belligerent parties. Thus in the diplomatic discussions preliminary to the treaty of 1661[9] the Swedish Ambassador contended in the first place "that in Finland pitch and tar were the chief commodities, which if they did not vend them yearly, having great quantities of them, the country could not subsist, nor would the commodity last above one year in their vessels, but by reason of the great strength of it, being kept longer, it would break the hoops of the vessels and be lost; and if the least restraint should be put upon the vending of it to any place, the inhabitants of Finland would think themselves undone, and it would be a great prejudice to their trade." He urged in the second place, that "it had been taken for granted, when the treaty of Upsal (9 May 1654)[10] was concluded, that these commodities should not be taken for contraband." Mr. Whitelock, the negotiator of the treaty of Upsal, in reply admitted that when he was in Sweden,

Treaty of Upsal, 1654.

[8] Martens, Récueil, IX. p. 431.

[9] Whitelock's Memorials, May 1656.

[10] Hertslet, I. p. 310.

England being at that time at war with the Dutch, his judgment was not to insist on having pitch, &c. to be Contraband goods, but rather that they should not be esteemed so: "and my reason," he said, "was because the Dutch could have them notwithstanding by small vessels, which should take them in at Hamburg, or have them brought from Lubeck most part of the way by water to Hamburg, and from Hamburg in those vessels they could bring them down the Elbe, and from thence by the Flats, which are shoal waters full of sand on the coast of Bremen, and so along to Holland, without going at all into the open sea, or coming within the danger of our ships, which could not come among those Flats, nor hinder the Dutch from having of those commodities. But on the other side they could not be brought to England but through the wide sea, where they were subject to the danger of being intercepted by our enemies; and if I should have agreed to have them Contraband goods, I conceived the same would have hindered England being supplied, and not have hindered our enemies having of them. But now, I said, our war with Spain had made a great difference as to that matter, because they could not have them but through the wide sea, where they must be brought by us, and we shall watch the conveyance of them."

Equity as to conditional Contraband.

§ 148. In the absence of treaty engagements under which ships have been enumerated amongst articles prohibited to be transported to the enemy's country[11], a question has sometimes arisen with respect to ships which are going for sale to an enemy's port, the construction of which ships is such, that there can be no doubt that they would be easily convertible to belligerent uses. Where the neutral owner knew that

Ships under circumstances Contraband of War.

[11] Treaty of Westminster of 1654, supr. Treaty of Whitehall of 1661.

his vessel was peculiarly adapted to the purposes of war, and was avowedly going with it to the enemy's country with the intention and expectation of selling it to the enemy to be employed as a vessel of war. Lord Stowell had no hesitation in condemning the vessel as Contraband of War[12]. The same view had been adopted by the Lords of Appeal on 27 July 1804 in the case of the Brutus, which had been recently built at Salisbury, in the State of Massachusetts, pierced for fourteen guns, but with only two mounted to defend her, as alleged, against French privateers. She had been sent on her first voyage to the Havannah with instructions to her master to sell her; and having been captured on her voyage was condemned in the Vice-Admiralty Court of Halifax as Contraband of War[13]. The Lords on this occasion expressed their reason for condemning the vessel as Contraband of War, on the ground that she was built, as the report of the Surveyors clearly established, for purposes of war, not for peace, and was going to be sold to the enemy. On the other hand, where the character of a vessel has been equivocal, and it has been actually engaged in trade, and the occasion for selling it has arisen out of the circumstances attending its employment in trade, the Lords have decreed restitution[14]. The *bona fides* of the merchant has even been allowed to exempt a vessel from confiscation which had been employed for the purposes of war, but was withdrawn from such uses. Thus in the Raven, Jennings, the vessel had been a French privateer, and had been condemned as such in New York; but it appeared that the purchaser had bought her for the purposes

[12] The Richmond, 5 Ch. Rob. p. 331, 7 Dec. 1804.

[13] The Brutus 5 Ch. Rob. Appendix, p. 1.

[14] Fanny, Ingraham, 24 March 1804. Neptune, Gibbs, 18 July 1804.

of trade, and having used his best endeavours to make her fit for that service, had found her unsuitable, and was on that account intending to sell her again, the Lords reversed the judgment of the Vice-Admiralty Court of the Bahamas and decreed restitution. It will appear to be the result of the various judgments of the highest British Court of Prize, that though the principle of considering the transport of ships of war to the enemy as contraband is strictly upheld by it, the application of the principle has been restricted to cases in which no doubt existed as to the character of the vessels, or the purposes for which they were intended to be sold.

The transport, not the sale of merchandise to the enemy penal under the Law of Nations.

§ 149. By the Ancient Law of Europe, the carrying of Contraband of War to an enemy's port worked a forfeiture of the ship; nor can it be said, as Lord Stowell has justly observed[15], that such a penalty is unjust or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. In the Proclamation[16] issued by King Charles I in 1626, to warn neutrals not to furnish the King of Spain and his subjects with provision for shipping or munition for the wars, or with victuals, it is declared, that "if any person whatsoever after three months from the publication of these presents shall, by any of his Majesty's own ships, or the ships of any of his subjects authorised to that effect, be taken sailing towards the places aforesaid, having on board any of the things aforesaid, or returning thence in the same voyage, having vented or disposed of the said prohibited goods, his Majesty will hold both the ships and goods so taken to be lawful prize, and cause them to be ordered as

[15] The Ringende, Jacob, 1 Ch. Rob. p. 91. p. 856. Robinson's Collectanea Maritima, p. 66.

[16] Rymer, Fœdera, Tom. XVIII.

duly forfeited; whereby his Majesty doth put in practice no innovation, since the same course has been held, and the same penalties have been heretofore inflicted by other States and Princes upon the like occasions, and avowed and maintained by public writings and apologies." This rule appears to have been modified in respect of the return voyage as early as the year 1672, since we find it laid down amongst the positions[17] of Sir Robert Wiseman, King's Advocate, that "nothing is forfeited but what is taken going to the enemy; for after the contraband goods are delivered, neither the ship nor the proceeds of the contraband goods, upon their return, will be liable upon that account to confiscation, much less will any other lading in the ship be confiscated." On the other hand the same eminent civilian lays it down that "by the Law of Nations a ship carrying contraband goods forfeits itself only and the said goods contraband, but not any other goods besides, that are not contraband." It seems however that under the modern practice of the British Prize Courts, as stated by Lord Stowell, a milder rule has been adopted, and the carrying of contraband articles is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant circumstances[18]." The milder rule dates from the early part of the eighteenth century, as

[17] Pratt on Contraband of War, p. 255.

[18] Bynkershoek strongly vindicates the strictness of the ancient law: "Publicabam quoque naves amicas, si scientibus dominis contrabanda ad hostes deferrent; et nisi pacta impediant, omnino publicandæ sunt, quia earum domini operantur rei illicitæ." Quæst. Juris Publici, L. I. c. 1. Grotius and Loccenius distinguish the case in which the owner of the ship is privy to the contraband cargo, and in such case hold that the ship is forfeited; but where the contraband nature of the cargo is unknown to the

we find an exception introduced into the twenty-sixth article of the Treaty concluded between France and Great Britain at Utrecht in 1713, in favour of the ship itself as well as the other goods found therein, which were to be esteemed free and not confiscated as lawful prize, notwithstanding that part of the cargo should consist of goods declared by that treaty to be contraband, and accordingly liable to be confiscated. In order however to exempt the ship from confiscation, the most perfect good faith must be shown upon the part of the owner of the ship and the master as his agent, for false papers setting up a pretended neutral destination will work a forfeiture of the ship[19], as well as of the cargo. So if the trade be in breach of any specific Treaty-engagements, as for instance when a Danish ship was carrying tar to an enemy's port, contrary to the Treaty-engagements between Great Britain and Denmark[20]. So if an attempt is made by the master to conceal any contraband cargo on board, by fictitious bills of lading, the ship will be condemned with such portions of the cargo[21]. Contraband articles will also affect innocent parts of the cargo when they both belong to the same owners[22], and contraband articles, appearing by the ship's papers to belong to a part-owner of the ship, have been held to affect his share of the vessel[23]. According to the practice of the French Prize Courts, if the contraband portion of the cargo compose three quarters of the entire cargo,

owner of the ship, the forfeiture of the ship should not follow the condemnation of the cargo.

[19] The Sarah Christina, 1 Ch. Rob. p. 238. The Franklin, 3 Ch. Rob. p. 221. The Edward, 4 Ch. Rob. p. 68. The Ranger, 6 Ch. Rob. p. 126.

[20] The Neutralitet, 3 Ch. Rob. p. 296.

[21] The Richmond, 5 Ch. Rob. p. 325.

[22] The Stadt Embden, 1 Ch. Rob. p. 27.

[23] The Jonge Thomas, 1 Ch. Rob. p. 329.

the ship will be confiscated, together with the entire cargo[24]. The carrying of a contraband cargo is held under all circumstances by English Prize Courts to work a forfeiture of the freight[25]. This is a rule recognised by Bynkershoek[26], and the Courts of the United States of America[27] have adopted it. By the ancient law, as already observed, the ship, which had succeeded in carrying a contraband cargo to the enemy, was liable to be seized and confiscated on its return voyage. The severity of this law is still maintained in the case where the vessel has succeeded in carrying its contraband cargo to its destination by means of false papers, and the return cargo has been condemned together with the vessel, even in cases where the cargo has not been purchased with the proceeds of the contraband articles[28].

Treaty-Engagements between Prussia and the United States of America.

§ 150. A somewhat singular innovation upon the practice, which has prevailed amongst the Nations of Europe in regard to Contraband of War, has been introduced into the Treaty-engagements between the United States of America and Prussia. The earliest Treaty-engagements between these two Powers on this subject occur in a Treaty of Amity and Commerce signed at the Hague on 10 Sept. 1785, and those engagements were renewed in a more complete manner in a subsequent Treaty signed on 11 July

[24] Règlement de 26 Juillet 1778, à l'egard des Navires des États neutres, qui seraient chargés de marchandises de contrebande destinées à l'ennemi, ils pourront être arrêtés, et les dites marchandises seront saisies et confisquées; mais les bâtiments et le surplus de la cargaison seront relâchés, à moins que les dites marchandises de contrebande ne composent les trois quarts de la valeur du chargement; auquel cas les navires et la cargaison seront confisqués en entier. Traité des Prises Maritimes, par A. de Pistoye et Ch. Duverdy, Tom. I. p. 392.

[25] The Mercurius, 1 Ch. Rob. p. 288.

[26] Quæstiones Juris Publici, L. I. c. 10.

[27] The Commercen, 1 Wheaton, p. 382.

[28] The Nancy, 3 Ch. Rob. p. 122. The Margaret, 1 Acton, p. 336.

1799. By Article XIII of the latter Treaty it is provided as follows: "And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying however a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in a case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port nor further detained, and shall be allowed to proceed on her voyage. All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartouch-boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger ought to have; and in general whatever is comprised under the denomination of

arms and military stores of what description soever, shall be deemed objects of Contraband." The provisions of this Article have been renewed by the twelfth article of the Treaty of Commerce concluded between Prussia and the United States of America on 1 May 1828[29], which is now in force.

Belligerents may not interfere with Trade within the jurisdiction of a Neutral State.

§ 151. As the exercise of Belligerent Right can have no place within the territory of a Neutral State, a belligerent cannot interfere *jure belli* with any branch of trade, which is carried on within the jurisdiction of a Neutral State. Trade only becomes Contraband of War, when the merchandise is transported beyond the jurisdiction of a Neutral State, and is on its way to an enemy's ports, or to an enemy's ships upon the High Seas[30]. A neutral Nation is not bound to prohibit its subjects from trading in any article whatsoever with merchants who frequent its ports, and who may be the subjects of belligerent Powers, for the sovereignty of a neutral Nation within its own territory is as absolute in regard to Nations which are at war with one another, as in regard to Nations which maintain relations of peace with one another. The duty of a neutral Nation, as such, towards belligerent Nations, is comprised in one word, *impartiality*. It is not the duty of a neutral Nation, as such, to undertake to prevent merchants, who frequent its ports, from carrying out of its jurisdiction the articles which they may have purchased,

[29] Martens, N. R. VII. p. 619. Preussens Staatsverträge, p. 852.

[30] The proclamation of King Charles I (anno 1625) is directed against any ships that shall sail with intention to pass to any of the King of Spain's countries or dominions, or to any of the King of Spain's ships, being on the sea. (Robinson's Collectanea Maritima, p. 59.) The majority of the Judges of the Supreme Court of the United States in the case of the Commercen, Wheaton, I. p. 382, were disposed to apply the principle of Contraband to merchandise, which was being carried to an enemy's army in a neutral country.

on the ground that those articles may be destined to the uses of a belligerent Power; it is the business of every belligerent Power to enforce its Rights of War, if it sees fit, on the High Seas, or within the enemy's territory. A neutral Nation may indeed bind itself by Treaty-engagements with a belligerent Nation not to allow any merchants to purchase within its jurisdiction certain articles, if they are to be carried to the ports of the adverse belligerent; but the observance of such Treaty-engagements will be inconsistent with neutrality, unless the neutral Nation should apply the same prohibition equally to all merchants intending to carry such articles to the ports of either belligerent. It is not however the practice of Nations to undertake to prohibit by their territorial laws merchants from purchasing in their ports those articles, which a belligerent Power may confiscate to its own uses *jure belli*, if it finds them on the High Seas, in the course of transport to the ports of his enemy, much less is it the practice of neutral Nations to confiscate such articles after purchase, whilst they are within its jurisdiction. A Belligerent alone has any right *jure belli* to take possession of that, which is the property of another person.

Mr. Webster, in a letter to Mr. Thompson, of July 8, 1842[31], has well observed, in his character of Secretary of Foreign Affairs to the President of the United States of America, that "the trade in articles contraband of war is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of Nations or particular Treaties. If it be true, therefore, that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico,

[31] Webster's Works, VI. p. 452. cited in the sixth edition of Wheaton's Elements, Part iv. c. 3. § 26. p. 571.

has been supplied with arms and munitions of war, the Government of the United States, nevertheless, was not bound to prevent it, could not have prevented it without a manifest departure from the principles of neutrality, and is in no wise answerable for the consequences."

To the same effect Klüber has observed[32], "The practice of Nations received in Europe at the present day permits a commerce in time of war between neutrals and belligerents. It has only subjected it to certain restrictions with regard to the immediate necessities of war, and in respect of places under blockade. It does not forbid neutrals to sell to the Subjects of a belligerent Power articles which serve immediately to the uses of war, when the belligerents purchase the articles in the neutral country and export them themselves. If, on the contrary, a neutral state or its subjects transport such articles to one of the belligerents, it is a violation of neutrality, and the merchandise is then styled 'Contraband of War.'"

A modern French naval writer, M. Ortolan[33], has to a similar purpose laid great stress upon the terms 'Commerce de transport,' as being that alone which is contraband or illicit. "A neutral state," he writes, "which permits its subjects to carry on a passive trade in such objects, that is, which allows the subjects of either belligerent indiscriminately to come and purchase articles in its markets, to be transported at their own cost and risk and in their own ships, does not violate its neutrality, nor can it be said to take part in the war because it allows free access to its ports, and maintains for all Nations the same rights, which they had before war broke out, of

[32] Droit des Gens. § 288. Tom. II. L. III. c. 6. p. 158.
[33] Diplomatie de la Mer, Vattel, L. III. c. 7. § 111.

coming to supply themselves in the way of commerce with the merchandise, of which they may have need; the neutral Nation cannot be responsible for the ultimate uses to which such articles may be applied, nor is it bound to know for whom they are bought, or what destination is reserved for them."

To a similar purport Chancellor Kent[34] has remarked, that "it was contended on the part of the French Nation, in 1796[35], that neutral governments were bound to restrain their subjects from selling or exporting articles Contraband of War to the belligerent Powers. But it was successfully shown by the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country[36]."

34 Kent's Commentaries, Tom. I. p. 142. Santissima Trinidad, 7 Wheaton, p. 783. Richardson *v* Marine Insur. Company, 6 Mass. Rep. 113.

35 Mr. Adet's Letter to Mr. Pickering, 11 March 1796.

36 The judgments of the Supreme Court of the United States had been anticipated by the opinion delivered by the Attorney-General of the United States on 20 January 1796, that "if the individual citizens of the United States carry on a contraband commerce with either of the belligerent Powers, neither can charge it upon the Government of the Neutral Nation as a departure from Neutrality, and that it is not considered as a duty imposed upon a Nation by a state of Neutrality to prevent its seamen from employing themselves in contraband trade; nor are there to be shown any instances where a Neutral Nation has exercised, or attempted to exercise, its authority in restraining practices or employments of this kind." Opinions of the Attorney-General of the United States, Vol. I. ed. 1852. p. 62.

CHAPTER VIII.

ENEMY CHARACTER.

Domicil the criterion of National Character for purposes of war —Permanent Residence constitutes Domicil—An acquired Domicil may be abandoned at the outset of war—The character of property is not always identical with the character of its owner—The enemy character may be engrafted *sub modo* on the neutral character—Distinction between enemies *de facto* and enemies *de jure*—Employment of neutral property in the service of a Belligerent State—The mercantile character is not affected by the consular character—The character of the produce of landed estates depends upon the character of the country, and not of the owners—Santa Cruz—City of Hamburg—Island of Corfu—Treaties of Cession—Louisiana—Treaty of Tilsit—The Seven Islands—The character of property cannot be changed *in transitu* on the High Seas—Exceptions in transactions of good faith, originating in time of peace—Enemy character may attach to places in the occupation of an enemy—Places in the occupation of an ally may be devested of the enemy character.

Domicil the criterion of National Character for purposes of war.

§ 152. WHEN a Sovereign Power is at war with another Sovereign Power, all the subjects *de facto* of the one Power are enemies *de jure* of the other Power, and the juridical obligations of amity which exist between them, as individuals, are suspended during the continuance of war. It does not however follow, according to the modern practice of Nations, that all the natural born subjects of a belligerent Power are enemies *de facto* of the other Power. It was the

ancient practice in formal Declarations of War for the Sovereign Power, which declared War, to require all its subjects to treat as enemies all the subjects of the Enemy-Power, in other words to require all persons who owed allegiance to it to treat, as enemies, all persons who owed allegiance to the Enemy-Power. But when the principle of Territorial Sovereignty came to be recognised by the Nations of Europe, as the basis for regulating their mutual relations as Nations, the character of an individual for international purposes came to be regarded from a territorial point of view, and personal allegiance ceased to be an absolute criterion of Enemy-Character. Under the feudal system individual men were bound, in virtue of their personal relations towards their Lord, to treat, as enemies, all who were enemies of their Lord. Under the theory however of Territorial Sovereignty the character of enemy-subjects is held to attach to the occupants of an enemy's territory, for all the occupants of the territory of a belligerent Sovereign are regarded as his subjects *de facto*, and are consequently enemies *de jure* of the other belligerent. Under this system of Public Law Domicil has become the criterion of National Character for purposes of war; and accordingly all natural born subjects of a belligerent Power, who may have abandoned their native country and acquired a domicil in a neutral country before hostilities have commenced, will have effectually clothed themselves with the character of neutral subjects, precisely as every natural born subject of a neutral Power will have clothed himself with the character of an Enemy-subject by long continued residence, coupled with the intention of remaining, in the Enemy's territory.

So strongly is the principle of Territorial Domicil interwoven with the administration of the Law of

Prize, that even as between a Sovereign Power and his natural born Subject, the neutral Domicil of the latter may be set up in time of war as counterbalancing the principle of Natural Allegiance. Thus the Lords of Appeal held that a British born subject, resident in the English factory at Lisbon, so far possessed a Portuguese character, that his trade with Holland (then at war with England, but not with Portugal) was not impeachable as illegal trade[1]. On the same principle Lord Stowell held that a Natural born British Subject domiciled in the United States, who had estranged himself from his British character as far as his own volition and act could do, was not entitled to be regarded as a British subject, so as to come within the benefit of an order in Council directing the restitution of all vessels under the flag of the United States of America, which were *bonâ fide* and wholly the property of British subjects[2]. So likewise a person who was a natural born British subject, but had become a naturalised French subject, and whose property had been confiscated by the French Government, was held not to be within the provisions of a Treaty concluded between France and Great Britain, whereby compensation was given to British subjects[3]. On the other hand a foreigner, who was actually domiciled in Great Britain at the period of the confiscation of his property by the French Government, was held to be entitled to claim compensation for his losses under a Treaty providing such compensation for British subjects[4].

§ 153. An essential difference exists between

[1] The Danous, 17 March 1802, in a note to the Nayade, 4 Ch. Rob. p. 256.

[2] The Ann, 1 Dodson, p. 221.

[3] Sir William Grant's observation in the case of Devereux in a note to Drummond's case, 2 Knapp, p. 301.

[4] André's case, in a note to the Countess of Conway's case, 2 Knapp, p. 365.

national character for municipal purposes, and national character for international purposes. Every independent State is competent to decide absolutely upon what conditions individuals shall enjoy the benefits of membership with it; and it may accord to persons born in foreign countries with more or fewer restrictions the same benefits which it accords to Natives, without reference to the consent of any other State. Accordingly the Right of Naturalising a natural born subject of another State is claimed and exercised by every independent Power without any regard to the municipal law of the particular State, within the territory of which the individual may have been born; but such Naturalisation does not necessarily determine the National Character of the individual for international purposes. It does not in the first place release the individual from his obligations of Natural Allegiance to the country of his Origin, for he can only be released from those obligations with the consent of the Sovereign to whom his allegiance is due; in other words the Naturalisation of an individual by a foreign State may operate to give to the party naturalised all the privileges of a natural born subject within the territory of the State itself, but it will be inoperative to dissolve his previous relations with the country of his Origin. Those relations indeed may be dissolved in such a case *ipso facto* under the provisions of the Municipal Law of the country of his Origin; but again the dissolution of those relations under that Law does not necessarily take effect beyond the territory, within which that Law is supreme. For instance, a third Nation might decree that the nationality of all foreigners coming within its jurisdiction shall be determined by their Origin, and by no other criterion whatsoever. Under such circum-

Permanent Residence constitutes Domicil.

stances a person who is by Origin an Austrian subject, and has been naturalised in France, and thereupon by the Law of France has acquired in France all the rights of a natural born subject of France, whilst by the Law of Austria he has lost in Austria all the rights of a natural born subject of Austria, might be adjudged by the Tribunals of a third Power to be clothed within its territory with an Austrian Nationality by reason of his Origin. Again, a Nation may have made no provision whatever under its Municipal Law for distinguishing the *status* of one foreigner from that of another foreigner within its territory; and such a system of Law may not be attended with any inconvenience in time of peace, but in time of war it becomes indispensable for every Nation to have some criterion to enable it readily to distinguish the character of an alien friend from that of an alien enemy. Nations have accordingly sought for a common rule in such matters, which would be free from ambiguity, whilst it should commend itself to universal acceptance by its natural justice; and Permanent Residence has been found to answer all the requirements of such a rule. An individual cannot be permanently resident in two countries; and wherever he is permanently resident, there he is contributing by his industry and general wealth to the strength of the country, and to its capacity to wage war. There can be therefore no injustice in regarding the property of such a person as forming part of the common stock of the Enemy Nation, upon which a belligerent may make reprisals. Thus Grotius[5] observes, "By the Law of Nations all the

5 L. III. c. 2. § 7. Jure gentium subjacent pignorationi omnes subditi injuriam facientis, qui tales sunt ex causa permanente, sive indigenæ, sive advenæ: non qui transeundi, aut moræ exiguæ causa alicubi sunt.

subjects of the Sovereign, from whom an injury has been received, who are such from a permanent cause, are liable to reprisals, whether they be natives or immigrants, but not such persons as are only passing through his territory and sojourning in it for a short time." Accordingly we find, in the ordinary Declarations of Reprisals issued by Sovereign Powers, an express provision that the ships and goods of all persons inhabiting the territory of the adverse Power shall be subject to Reprisals[6]. The most recent order in Council issued by Great Britain on 29 March 1854 was to the like effect, "Her Majesty is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that general Reprisals be granted against the ships, vessels, and goods, of the Emperor of All the Russias and of his subjects and *others inhabiting* within any of his countries, territories, or dominions."

An acquired domicil may be abandoned at the outset of war.

§ 154. Every inhabitant of an enemy's country is accordingly *primâ facie* an enemy, and his property may be seized by a belligerent, if found in any place where a belligerent may lawfully exercise the Rights of War. The burden of proof in such a case, that the merchant, whose property has been seized, is a natural born subject of a neutral Power, and of Right ought not to be treated by the belligerent Power as an enemy, falls upon the merchant. If he has acquired a Domicil in the enemy's country before war has commenced, and does not thereupon take immediately effective measures to abandon his acquired Domicil, he will be precluded by his Domicil from setting up his Neutral character of Origin. An actual return however to the country of his Origin is not always necessary, in order that such a person should devest himself of his Enemy-character nor

[6] The Postilion, Hay and Marriott, p. 245.

even an actual departure from the country of his adoption, if he has actually put himself in motion in good faith to quit the Enemy's country with the intention of abandoning his residence in it. Lord Stowell[7] has observed in regard to the national character of a natural born citizen of the United States of America, who by long residence in England had acquired under the Law of Nations the character of a British merchant at the commencement of hostilities between Great Britain and the United States, that "the character, that is gained by residence, ceases by residence. It is an adventitious character, which no longer adheres to him from the moment, that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi.*" Accordingly, notwithstanding the owner of the ship Indian Chief had not quitted England at the time when his vessel sailed on an outward voyage from London, still as he had actually left England and was *in the act* of resuming his original American character at the time when his vessel was seized on her arrival at an English port for orders, the Prize Court held that her owner was to be considered as a neutral American citizen. So the Lords of Appeal[8] had previously held that a Natural born Subject of Great Britain, who had acquired a Dutch domicil by continued residence in Surinam and St. Eustatius, and had left those settlements with the intention of returning to Great Britain, but was still in Holland, the mother country of those settlements, when the order of Reprisals on the part of Great Britain against Holland was issued, was nevertheless entitled to the restitution of his property as a British subject, inasmuch as he was

7 The Indian Chief, 3 Ch. Rob. p. 20.

8 The Snelle Zeylder, Lords, 28 April 1783, reported in a note to the Indian Chief, 3 Ch. Rob. p. 21.

in itinere, had put himself in motion, and was in pursuit of his native British character. So likewise a British born subject who was domiciled in Holland at the commencement of hostilities with Great Britain, as partner in a house of trade at Flushing, and had immediately made arrangements for the dissolution of his partnership, and was only prevented from removing personally by the violent detention of all British subjects who happened to be within the territory of the enemy at the breaking out of war, was held by Lord Stowell to be entitled to have his property restored to him as a British subject[9]. The same rule has been recognised in the Courts of the United States. "It is certainly true," observes Mr. Justice Story[10], "that a character acquired by residence ceases with the discontinuance of the residence. And therefore if a party, who has resided in an enemy country, puts himself *in itinere* to return to his native country with an intention of *bonâ fide* residence there, he is deemed already to have resumed his neutral character, although he has not arrived in such country. But until he has actually put himself *in itinere*, the character of the country where he resides adheres indissolubly to him. He takes it, with all its benefits and all its disadvantages."

The character of property is not always identical with the character of its owner.

§ 155. It has been sometimes said, that there is a peculiarity about Domicil in time of war, as distinguished from Domicil in time of peace; and that as a person may have establishments in two countries for commercial purposes, he may have in time of war for commercial purposes both a neutral Domicil and a belligerent Domicil. It is true, indeed, that the Municipal Law of a State may permit a citizen to

9 The Ocean, 5 Ch. Rob. p. 91.

10 The ship Frances and cargo, 2 Gallison, p. 616.

have two or more Domicils for Civil purposes; but Domicil for Municipal purposes means something different from and must be distinguished from Domicil for International purposes. An individual can only have one personal Domicil for international purposes in the sense in which Domicil is a criterion of a person being a friend or an enemy, for no person can be at the same time both a friend and an enemy under the Law of Nations; but an individual may be a belligerent *de facto*, notwithstanding that the Sovereign of the country, in which his property is situated, observes neutrality; and, on the other hand, his property may be engaged in the service of a belligerent Power, whilst he is himself resident in a neutral country, and does not personally take part in the war. The more philosophical view would rather seem to be that, which does not admit the Domicil of the owner to be conclusive of the immunity of his property in all cases from capture on the part of a belligerent, but only allows it to found a presumption of immunity, which may be rebutted by evidence that his property is *de facto* employed in the service of the enemy. "It is very clear," observes Mr. Justice Story[11], "that in general the national character of a person is to be decided by that of his Domicil: if that be neutral, he acquires the neutral character; if otherwise, he is affected by the enemy's character. But the property of a person may acquire a hostile character altogether independent of his own peculiar character derived from residence. In other words, the origin of the property, or the traffic in which it is engaged, may stamp it with a hostile character, although the owner may happen to be domiciled in a neutral country. Such are the familiar instances of engagements in

[11] San Jose Indiano and cargo, 2 Gallison, p. 28.

the colonial, coasting, fishing, or other privileged trade of the enemy[12]. So the produce of an estate in an enemy's colony belonging to a person permanently resident in a neutral country, is impressed with the character of the soil, notwithstanding the character of the owner[13]. So if a vessel purchased in the enemy's country is by consent and habitual occupation employed in the trade of that country during the war, she is deemed a vessel of the country from which she is so navigating, whatever may be the domicil of the owner[14]. The principle to be extracted from these cases seems to be, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country upon the same footing and with the same advantages as native resident subjects, his property *so employed* is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may; and the principle seems founded on reason. Such a trade so carried on has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It subserves his manufactures and industry, and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation in the same manner, as if the trade were pursued by native subjects. There is no reason therefore why he who thus enjoys the protection and benefits of the enemy's country, should not *in reference to such a trade* share its dangers and its losses. It would be too much to hold him entitled by a mere neutral

[12] The Vigilantia, 1 Ch. Rob. p. 1. The Immanuel, 2 Ch. Rob. p. 148. The Anna Catherina, 4 Ch. Rob. p. 107. The Rendsborg, 4 Ch. Rob. p. 121. The Vrow Anna Catherina, 6 Ch. Rob. p. 161.

[13] The Dree Gebroeders, 4 Ch. Rob. p. 235. The Phœnix, 5 Ch. Rob. p. 20.

[14] The Vigilantia, 1 Ch. Rob. p. 12.

residence to carry on a substantially hostile commerce, and at the same time possess all the advantages of a neutral traffic. "I agree therefore that it is a doctrine supported by strong principles of equity and propriety that there is a traffic which stamps a national character on the individual, independent of that national character which mere personal residence may give him[15].

The enemy-character may be engrafted *sub modo* on the neutral character.

§ 156. The decisions of Prize Tribunals have sometimes proceeded upon the view that a belligerent character may be engrafted *sub modo* upon the neutral character of a merchant, without suspending altogether the latter. But this is only another form of embodying the principle that the neutral Domicil of the owner is not always conclusive of the neutral character of his property. When a merchant has commercial establishments in two countries, and it is necessary in time of peace to decide by what law the succession to his personal property is to be governed, the country, which is the seat of his principal establishment, is held to be the place of his Domicil. But Courts of Prize do not weigh the question of Domicil in the same accurate scales which are used by Courts, which administer the Law of Nations in time of Peace; and they have been accustomed to rule, that if a person has mercantile concerns in two countries, and acts as a merchant of both countries, he must be liable to be considered as a subject of either the one or the other, according as the particular transactions of his commerce have originated in one or other of the two countries[16]. Accordingly both the British and American Prize Courts have held that the same

[15] The case of Zacharie, Coopman and Co., before the Lords of Appeal, 9 April 1798, referred to by Lord Stowell in the Vigilantia, 6 Nov. 1798. 1 Ch. Rob. p. 15.

[16] The Jonge Classina, 5 Ch. Rob. p. 303.

person may have an enemy-character for certain purposes of commerce, combined with a neutral character for other purposes; and that his property, which is incorporated into the general trade of the enemy, may be condemned as enemy-property, whilst his property incorporated into the general trade of a neutral Nation, will not be liable to hostile confiscation. Thus it has been decided by the Supreme Court of the United States, that the property of a House of Trade, established in an Enemy's country, is condemnable as prize, notwithstanding the neutral Domicil of one or more of the partners[17]; and the High Court of Admiralty of England has held, that goods exported from an Enemy's country on behalf of a House of Trade, of which all the partners are domiciled subjects of a neutral Power, may be confiscated *jure belli*, if they have a permanent commercial agent in the Enemy's country to carry on a privileged trade of the Enemy[18]. The same principle seems to govern these cases, which founds the right of every belligerent to capture and confiscate the goods of a neutral merchant, which are being conveyed upon the High Seas to an Enemy's country, if such goods are of their own nature suitable to belligerent purposes, and which likewise founds the right of a belligerent to capture and confiscate the goods of a neutral merchant, of whatever nature they may be, which are being carried to an Enemy's port, which the belligerent has placed under blockade. In both of these latter cases it is obvious, that the commercial adventure, if it should be successful, will influence the conduct of the war in favour of the party to whom the supplies are being carried. Such

[17] The Friendschaft, 4 Wheaton, p. 107. The Antonia Johanna, 1 Wheaton, p. 168.

[18] The Anna Catherina, 4 Ch. Rob. p. 119.

an adventure is accordingly inconsistent with neutrality, and in such a case it is immaterial what may be the National character of the merchant, who has committed his property to an unneutral adventure. On an analogous principle, if a merchant domiciled in a neutral country does not take immediate measures at the commencement of war to withdraw his property from an unneutral trade, which he may have lawfully carried on in time of peace in the country of a belligerent, he cannot protect his property from hostile capture and confiscation, by alleging that he is personally resident in a neutral country. So likewise if the subject of a neutral Power, who is resident in an Enemy's country upon the outbreak of war, does not take immediate measures to withdraw his property from the Enemy's trade, so much of his property as continues to be employed in such trade will be liable to confiscation by the other belligerent, as being subservient to Enemy-interests. The trade of such a person is identical *de facto* with that of an enemy merchant; and it may be justly said of an enemy merchant, as contrasted with such a trader, *Quid ille fecit hostiliter, quod hic non faciat*[19]?

Distinction between enemies *de facto* and enemies *de jure*.

§ 157. The essential question to be determined in war in regard to the character of every person, is whether he is a friend or an enemy. National character furnishes a safe test of friendly or hostile character in most cases, and the presumption arising from it does not require to be supported by any evidence of the conduct of the party. But the presumption arising from national character fails altogether, if the party is in action, and his acts are at variance with the character of his Nation. A belligerent has a natural right to treat as enemies,

[19] Bynkershoek, Quæst. Jur. Publ. L. I. c. 9.

all who conduct themselves as such towards him; they are enemies *de facto*, and whilst they continue to be such, the juridical incidents of the Enemy character must be deemed to attach to them equally as to persons who are enemies *de jure*. But there is this difference between enemies *de facto* and enemies *de jure*, that the former are enemies *sub modo* only, and in reference to so much of their conduct as is hostile. If they cease to act as enemies, the foundation of their hostile character is gone. The practice of Nations in this respect allows equitable considerations to have weight in the question. It is in the interest of the belligerent himself that an enemy *de facto* should be distinguished in Law from an enemy *de jure*. Peace is restored in the case of an enemy *de facto* by the cessation of hostilities: in the latter case however there is a question of Right, which remains to be settled by conference after the suspension of arms. But the conduct of a party is that of an enemy *de facto*, if he supplies the necessities of a belligerent, and by so doing furthers his resistance to his adversary. Upon the field of battle the men who bring up supplies from the rear are sustaining the energies of those in the front ranks: so in the case of a besieged town those who carry in supplies to the Garrison are furthering its resistance to the besiegers. There is no distinction in principle between the conduct of such parties, and the conduct of the trader who carries supplies into a blockaded port. The undertaking is evidently for the immediate benefit of one belligerent, and for the direct disadvantage of the other belligerent, and is accordingly inconsistent with neutrality. To allow the property of the trader in such a case to be exempt from capture and condemnation, on the grounds that he is resident in a neutral

country, would be unreasonable, for it is precisely in virtue of such residence that he is able to assist the enemy, by supplying him with those necessaries which the enemy has not in his own country. The merchant however is only considered to be thus far impressed with the hostile character, as regards his unneutral trade. He is so far and no further an enemy *de facto*.

Employment of the property of a neutral subject in the service of a belligerent Power.

§ 158. The Residence of a merchant in a neutral country is thus not always conclusive of the neutral character of his property in time of war. The use, to which an article is put, will in certain cases determine the right of a belligerent Power to seize and confiscate it, without any regard to the neutral character of the legal owner. For instance, if the subject of a neutral Power places an article, of which he is owner, at the absolute disposal of a belligerent Power for a certain time, the article in question becomes subject to capture and confiscation during such time, precisely as if it were enemy's property. To admit any other conclusion would be equivalent to allowing a belligerent to make war with borrowed weapons, and to preclude his adversary from seizing them and disarming him. It is immaterial in reference to the employment of the property of a neutral subject in the service of an Enemy State, whether such employment be voluntary or involuntary on the part of the owner. "If an act of force," observed Lord Stowell, "exercised by one belligerent on a neutral ship or person is to be deemed a sufficient justification for any act done by him contrary to the known duties of the neutral character, there would be an end of any prohibition under the Law of Nations to carry Contraband, or to engage in any other hostile act. If any loss is sustained in such service, the neutral yielding to such demands must

seek redress against the Government that has imposed the restraint upon him." Upon this principle Lord Stowell condemned as prize of war, a Swedish vessel[20], which had been employed by the French Government in transporting a troop of cavalry to Alexandria, notwithstanding the Master alleged that he was acting under duress. The conveyance of enemy-soldiers to a neutral country is distinguishable from the conveyance of enemy-soldiers to an enemy's country. If a vessel[21] belonging to the subjects of a Neutral Power is engaged in conveying military persons in the service of the enemy to an enemy's colony, such a trade will subject the vessel captured to confiscation, notwithstanding that the Master of the ship may have been deceived in respect of the military character of his passengers, and however few may be the number of them; although on the other hand the carrying persons in the military service of the enemy to a neutral country, as passengers in the ordinary course of trade, will not enure to the confiscation of the ship, if she be owned by the subjects of a neutral Power. Thus in the case of the Henric and Alida[22], which was a Dutch ship bound from a Dutch port to St. Eustatius, a Dutch Colony, with powder, guns, and naval stores on board, and five military officers in the enemy's service embarked as ordinary passengers, Sir George Hay directed the ship and cargo to be restored to the Dutch owners, Holland being at such time a Neutral Power.

It would be otherwise, however, if a neutral-owned vessel should have been hired by the agents of a belligerent Government so as to be entirely at its

[20] The Carolina, 4 Ch. Rob. p. 261.

[21] The Orozembo, 6 Ch. Rob. p. 436.

[22] 1 Hay and Marriott's Reports, p. 139.

disposal for the purpose of carrying soldiers or stores in the service of the State. It will signify nothing under such circumstances whether or not the troops or stores conveyed are to be applied immediately to hostile purposes, when they arrive at their destination. For instance, if Great Britain should be engaged in a war with Russia, and the British Government should charter a neutral vessel to transport a British regiment of infantry to Alexandria, the Sultan of the Ottomans, being at such time at peace with both the belligerent Powers, might consistently with neutrality allow a passage through a province of the Ottoman Empire to the troops of Great Britain. It is obvious however that the immediate destination of the vessel to a neutral port would not relieve such a traffic on the part of the shipowner from its hostile character. The actual conveyance of troops, either for present or for future use, is what constitutes the object and employment of transport-vessels; and it is a distinction totally unimportant, whether the transport of enemy-troops may be connected with immediate action in the service of the enemy or not[23]. So likewise the transport, coupled with the concealment, of *public despatches* addressed from the Governor of an enemy's colony to the Government of the mother country in charge of an officer of high rank, as a passenger on board of a neutral vessel, although the voyage of such vessel was to end in a neutral port, was held to be inconsistent with the neutral character, and to be an aggravated case of active interposition in the service of the enemy[24]. Other cases of trade in the service of the enemy may be enumerated, in which a neutral shipowner cannot with good faith and

[23] The Friendship, 6 Ch. Rob. p. 427.

[24] The Atalanta, 6 Ch. Rob. p. 460.

without forfeiture of his neutral character engage his vessel. Thus if a vessel is owned by the subject of a neutral Power, which is under treaty-engagements with a belligerent Power not to carry goods of a particular nature for the use of its enemies, the employment of such a vessel in carrying such commodities will work its forfeiture, if it be captured by the belligerent Power[25]. So again a vessel neutral owned but sailing under an enemy's license[26] or under enemy's convoy[27], renders itself thereby liable to capture by the adverse belligerent.

The Mercantile character is not affected by the Consular character.

§ 159. The national character of the Political agent of a neutral State, who is resident in a belligerent country, is not affected by such residence, whatever may have been the duration of such residence; but it is otherwise with a Commercial agent. A Consul does not participate in the privilege of exterritoriality, which a Political Envoy enjoys; and if he is personally engaged in the commerce of a belligerent country, his Consular character affords no protection to his mercantile adventures. "It is a point fully established in these Courts," says Lord Stowell[28], "that the character of Consul does not protect that of Merchant united in the same person. It was so decided in solemn argument in the course of the last war by the Lords, in the cases of Mr. Gildermester, the Portuguese Consul in Holland, and of Mr. Eykellenburg, Prussian Consul at Flushing[29]. These cases were again brought forward to notice in the case of Mr. Fenwick, American Consul at Bourdeaux, in the beginning of this war, on whose behalf

[25] The Neutralitet, 3 Ch. Rob. p. 296.

[26] The Julia, 8 Cranch, p. 189.

[27] The Nereid, 9 Cranch, p. 388.

[28] The Indian Chief, 3 Ch. Rob. p. 27.

[29] Concordia, Lords, 5 Feb. 1782. The Het Huys, Lords, 16 July 1784. The Pigou, Lords, 18 July 1797.

a distinction was set up in favour of American Consuls, as being persons not usually appointed, as the Consuls of other nations are, from among the resident merchants of the foreign country, but specially delegated from America, and sent to Europe on the particular Mission, and continuing in Europe principally in a mere Consular character. But in that case, as well as in the case of Sylvanus Bourne[30], American Consul at Amsterdam, where the same distinction was attempted, it was held, that if an American Consul did engage in commerce, there was no more reason for giving his mercantile character the benefit of his official character, than existed in the case of any other Consul. The moment he engaged in trade, the pretended ground of any such distinction ceased; the whole of that question therefore is as much shut up and concluded as any question of law can be." On the other hand the subject of a neutral Power, who carries on trade within the territory of the neutral Power, does not forfeit his neutral character by acting as Consul of a belligerent Power." "If the cargo," says Lord Stowell[31] in the case of a Swedish ship laden with tar, pitch, iron, hoops, and bars, and bound ostensibly for the neutral port of Cagliari, "had been really going to Cagliari, although it was the property of Mr. Koch, the French Consul, yet being as to his mercantile character a trader of Uddevalla, and his mercantile character being unaffected by his consular character, he would have a clear right to trade to the same extent as any other merchant of that place, and consequently to carry pitch and tar to a neutral port."

30 The Orion, Admiralty Court, 24 March 1797.

31 The Sarah Christina, 1 Ch. Rob. p. 238.

§ 160. Although the possession of landed estates in a belligerent country will not deprive a merchant, who is a domiciled subject of a neutral Power, of his personal neutral character, still the neutral character of the owner will not protect his property, which is in the course of transport from the belligerent country, as the immediate produce of his landed estates, from belligerent capture[32]. "The produce of a person's own plantation," says Lord Stowell[33], "in the colony of the enemy, though shipped in time of peace, is liable to be condemned as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the Nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal relations and occupation." It would appear from this decision that the breaking out of war subsequently to the shipment of the goods was sufficient to impress upon them an Enemy-character at the time of their capture. So if the character of a country be varied under the operations of war, if it passes by conquest out of the possession of one Power into the possession of another Power, the produce of the soil shipped after the conquest will vary in respect of its neutral or Enemy character according to the character of the conquerors. Thus the island of Santa Cruz, a possession of the Crown of Denmark, was captured by the British forces. Mr. Bentzon, who was a proprietor of land in the island, and at the same time an officer of the Danish Government, withdrew from the island after its surrender, and took up his residence in Denmark. The property of the in-

The character of the produce of land varies with the character of the country and not of the owners.

Santa Cruz.

[32] The Dree Gebroeders, 4 Ch. Rob. p. 233. 5 Ch. Rob. p. 168. The Phœnix, 5 Ch. Rob. p. 20.

[33] The Vrow Anna Catherina.

habitants not being disturbed by the conquerors, Mr. Bentzon still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of the estate, on board a British ship to a commercial house in London, at the risk of Mr. Bentzon. On her passage the ship was captured by an American privateer, and her cargo was condemned in a Prize Court of the United States, as British property[34]. "Some doubt," observed Chief-Justice Marshall, "has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation, although acquisitions made during War are not considered as permanent, until confirmed by Treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz after its capitulation remained a British island, until it was restored to Denmark." In this case all the power of the Civil Government had been absorbed by the conqueror, and the occupation of the island was politically complete. On the other hand, if a Neutral Country be in the military possession of a belligerent Power, but maintains her own civil Government *proprio jure*, the latter circumstance has been held sufficient to prevent the Country being considered as a conquered Country. Such was the purport of a decision in an English Court of Common Law in regard to the property of merchants resident in the City of Hamburg, which was at such time in the military occupation of French troops, but all the powers of civil government were administered in the same manner as they had for-

City of Hamburg.

[34] Thirty Hogsheads of Sugar *v.* Bentzon, 9 Cranch, p. 238.

merly been before the arrival of the French. In this case, which came on before the Court of King's Bench at Westminster and involved a question of Maritime Insurance, the Court held, that as Great Britain had by an order in Council permitted the inhabitants of Hamburg to continue their commerce with Great Britain, notwithstanding the Military occupation of the City of Hamburg by French troops, the inhabitants of Hamburg were to be considered as retaining their character of neutral merchants. To a similar purport in reference to the island of Corfu, in which, together with the other islands of the Ionian Republic, Russia had for four or five years maintained itself in military occupation, but during such time the flag of the Ionian Republic was displayed from the forts of the island, an Admiral appointed by the Ionian Republic presided over the port, a Consul from the Supreme Porte resided at Corfu, and an English Consul was recognised by the Prince and Senate of the Ionian Republic, Lord Ellenborough[35] refused to recognise the island as part of the Russian territory, or its inhabitants as co-belligerents with the Russians against the Ottoman Porte. "It is impossible," he observed, "to say that the Government of the Ionian Republic (which had been recognised at the peace of Amiens as an independent State) was superseded at a time, when its institutions subsisted and its supremacy was recognised[36]."

Island of Corfu.

§ 161. With regard to a country which has been ceded under Treaty by a neutral Power to an enemy Power, the signature of the Treaty is not sufficient to impress an Enemy character on the country and its inhabitants. Actual delivery into the possession of

Treaties of Cession.

[35] Hagerdon *v.* Bell, 1 Maule and Selwyn, p. 462.

[36] Donaldson *v.* Thompson, 1 Campbell, p. 438.

the enemy is required to give complete effect to the Cession. This question was considered by Lord Stowell[37] in a case where property was captured in the month of May 1803, in a voyage from the port of New Orleans to Havre de Grace, and was claimed on behalf of a merchant resident in New Orleans.

Louisiana.

Louisiana had been ceded by Spain to France under the treaty of San Ildefonso in 1796, but France had not actually taken possession of the country at the time when the property was captured. Lord Stowell held that "as it was a principle of jurisprudence that the actual possession of a thing must be united to the right of taking possession, before the Right of Property is complete, and as the practice of Nations had been in conformity with this principle, the country of Louisiana and its inhabitants continued to be under the dominion of Spain, until possession should have been actually taken by France. Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of Cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding is become almost a matter of necessity with regard to the colonial establishments of the States of Europe in the New World. The Treaties by which they are effected may not be known to them for months after they are made. Many articles must remain executory only, and not executed, until carried into effect; and until that is done by some public act, the former sovereignty must remain." On the other hand, if a country has been delivered over voluntarily by one Power to another Power, which is in actual possession of

37 The Fama, 5 Ch. Rob. p. 113.

it, although there may be no evidence forthcoming of a formal Treaty of Cession, the act of voluntary delivery will establish a legal presumption of a voluntary surrender of all title. Thus Russia had delivered up possession of the Seven Islands to France, and part of the French troops had been conveyed thither on board of and under the protection of Russian ships. No Treaty of Cession had been publicly announced, but France and Russia had settled their differences by the Treaty of Tilsit, and, the two countries being at peace with one another, there could be no doubt that the surrender of the Seven Islands to France had been a voluntary act on the part of Russia. Under these circumstances Lord Stowell held that "the voluntary surrender of the islands on the part of Russia was an actual transfer to France, and consequently that the inhabitants of the islands had become French subjects." A cargo therefore which had been shipped on board a Danish ship, bound from Zante to Copenhagen, and which was documented as the property of merchants resident in the Seven Islands, and which had been captured by an English privateer, after the Seven Islands had passed into the possession of France, was condemned as belonging to the subjects of France at the time of capture[38].

Treaty of Tilsit.

The Ionian Islands.

§ 162. There is a settled rule of the Prize Courts of Great Britain and the United States, that property cannot be devested of its enemy-character *in transitu* on the High Seas, and that all property which has a hostile character impressed upon it at the inception of a voyage, remains liable to capture until its arrival at its destination[39]. Thus a ship

The character of property cannot be changed *in transitu* on the high seas.

[38] The Bolletta, Edwards, p. 173.

[39] The ship Frances and cargo, 1 Gallison, p. 448, S. C. 8 Cranch, p. 354. The Vrow Margaretha, 1 Ch. Rob. p. 339

was captured by a British cruiser on a voyage from Batavia to Holland. She was the property of merchants resident at the Cape of Good Hope, who were enemy-subjects at the time when the vessel sailed, by reason of the Cape of Good Hope being at such time a Dutch settlement. During the voyage, and before the vessel was captured, the Cape of Good Hope had capitulated to the British forces, and the inhabitants had become British subjects. The ship however was condemned by Lord Stowell[40], as retaining its Dutch character, upon the authority of a decision of the Lords of Appeal in De Negotie en Zeevaart (18 July 1782). "I remember," observes Lord Stowell, "a *dictum* of a great Law Lord then present, Lord Camden, that 'the ship sailed as a Dutch ship, and could not change her character *in transitu*.'" The case of De Negotie en Zeevaart, on which Lord Stowell thus relied, is an important decision upon another point. It was the case of a Dutch ship which sailed from Demerara to Middleburg, in Holland, on 30 January 1781, about six weeks after the declaration of war on the part of Great Britain against Holland. Demerara subsequently surrendered to the British forces on 14 March, and the vessel was captured on 25 March. The terms of the Capitulation had been very favourable, and it had been announced by a Proclamation of the Commander of the British naval forces, that the inhabitants were "to be permitted to export their own property, and to be treated in all respects like British subjects, until his Majesty's pleasure should be known." Under the terms of this Proclamation, several claims were given in to the High Court of Admiralty of England for portions of the cargo on board De Negotie en

[40] The Danckebaar Africaan, 1 Ch. Rob. p. 112.

Zeevaart, as being the property of inhabitants of Demerara, described in such claims as British subjects. Sir James Marriott, the Judge of the High Court of Admiralty, had condemned the ship on 26 May 1781 and the master's adventure, as Dutch property, no claim having been given for them; but the claims for portions of the cargo, as the property of British subjects, stood over for argument, and came on before the Court on 23 February 1782, when Sir James Marriott decreed such portions to be restored to the claimants in their character of British subjects. From this decree the captors appealed, and the appeal came on for hearing before the Lords Commissioners of Appeal on 18 July 1782. On this occasion Lord Camden, the Lord President of the Council, said that "a General or Admiral taking a settlement or an island by Capitulation may by a Proclamation or otherwise grant to the owners the property actually taken; but he cannot protect from capture the property of the Capitulants at that time at sea, or out of the territory, so taken." Their Lordships accordingly reversed the sentence of the Judge of the High Court of Admiralty, and condemned the cargo[41] taken on board De Negotie en Zeevaart, as good prize.

Exception in transactions of good faith originating in time of peace.

§ 163. There is an exception however to the rule that property cannot be transferred *in transitu* on the High Seas, so as to acquire the national character of a neutral purchaser. A merchant of Hamburg entered into a contract with two Spanish houses for some wines, which were shipped from a Spanish port before the commencement of hostilities between Spain and Great Britain. If the transaction had originated in time of war, as it was admitted that the wines

[41] MS. Report of the judgment of the Lords of Appeal in De Negotie en Zeevaart, which is in possession of the author.

were shipped as Spanish property, they would have retained their Spanish character according to the rule of the Prize Court, until they had been delivered at their port of destination. "If such a rule did not exist," observed Lord Stowell, "all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. It is on this principle held, I believe, as a general rule, that property cannot be transferred *in transitu*, and in that sense I recognise it as the rule of this Court. But this arises out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract, and, being made before the war, it must be judged according to the ordinary rules of commerce[42]." In the above case Lord Stowell held that the commercial transaction was of a *bonâ fide* character, not made in contemplation of a war with any intention of defrauding the belligerent of his right to capture the goods of his enemy. So likewise in consideration of the fair course of mercantile speculation in time of peace, the same learned judge allowed a transfer of title to goods *in transitu* to be effected by the transfer of the bills of lading, when it had been done without any view of accommodation to relieve the seller from the pressure or prospect of war. But if the contemplation of war leads immediately to the transfer and becomes the foundation of a contract, which would not otherwise have been entered into on the part of the seller, and this is known to be so done in the understanding of the purchaser, though on his side there may be other concurrent motives, as in the

[42] The Vrow Margaretha, 1 Ch. Rob. p. 337. The Packet de Bilboa, 2 Ch. Rob. p. 133.

case of the Rendsborg[43], such a contract cannot be held good on the same principle that applies to invalidate a transfer *in transitu* in time of actual war[44]. "The nature of both contracts is identically the same, being equally to protect the property from capture of war, not indeed in either case from capture at the present moment, when the contract is made, but from the danger of capture, when it is likely to occur. The object is the same in both instances, to afford a guaranty against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are in my opinion justly subject to the same rule."

Enemy character may attach to places in the occupation of an enemy.

§ 164. Although the occupation of a territory by a military force is usually regarded as provisional, and is not held to change the national character of its *inhabitants*, until it has been confirmed by some formal act of Cession, or by Possession for a considerable lapse of time, yet an enemy-character may be impressed upon a place for commercial purposes by the temporary occupation of it by an enemy's army. The prohibition of all intercourse with the enemy applies not only to places which are normally and rightfully subject to the enemy, but to every place which is in the actual possession of the enemy, although the possession of it be so purely military and temporary, as not to have affected the national character of its inhabitants. The same considerations, which forbid intercourse with the enemy, apply to the ports of an allied or friendly Power, which are in the temporary occupation of the enemy, equally as to those which are under his permanent dominion.

43 The Rendsborg, 4 Ch. Rob. p. 121.
44 The Jan Frederick, 5 Ch. Rob. p. 133.

There is the same mischief likely to accrue to the belligerent Sovereign from such intercourse, and consequently the same breach of duty on the part of a neutral or a subject, if he should attempt to hold any such intercourse. Accordingly we find that in the British Order in Council of 15 April 1854, whereby Neutrals and British Subjects were permitted to transport enemy's property on board their vessels without fear of its capture, unless it should be Contraband of War, an express exception was made in respect of the destination of such cargoes on board of English vessels to ports in the *possession* of an enemy, namely, "that the British vessel should not under any circumstances whatsoever, either under or by virtue of this Order or otherwise, be permitted or empowered to enter or communicate with any port or place, which shall belong to or be in the possession or occupation of her Majesty's enemies."

Friendly character may attach to places in the occupation of an ally.

§ 165. On the other hand it is competent for a belligerent State to recognise the suspension *de facto* of the authority of an enemy over a province or colony, which has successfully revolted from the ruling or parent State. Thus the inhabitants of several portions of the island of St. Domingo had revolted against the Empire of France, at such time engaged in war with Great Britain, and the insurgent negroes, who were in actual occupation of those portions of the island, had detached them from the authority of France, and maintained, within those portions at least, an independent government of their own. Under such circumstances a British Order in Council was issued, permitting "British vessels to go to such ports and places in the island of St. Domingo as are not or shall not be under the dominion, and in the actual possession of his Majesty's enemies." Lord Stowell, in construing this Order, held that the legal meaning

of 'dominion' implies rightful possession and authority; as applied to private property it signifies not merely possession, but possession with rights of property, that of which the person is *dominus;* and as applied to public possession, it is the right of legal authority. Accordingly as the British Government had declared there were parts of the island, which were neither in the possession nor in the dominion of France, trade with such parts would be innocent. "It is not necessary," he observed, "that this declaration should amount to a perpetual recognition of the independence of those places, as in the case of a formal and permanent Cession. It is sufficient that there is a rightful and acknowledged suspension of the authority of France, that will of itself exempt the parties from the penalty of trading from an enemy's colony[45]." It is however not for the Prize tribunals, but for the Executive Government of a Nation, to decide, when the inhabitants of a revolted territory are entitled to be recognised as an independent Nation. Until that decision has been made, Courts administering the Law of Nations are bound to regard the Sovereignty of the ruling or Mother State to be still subsisting of Right.

45 The Manilla, Edwards, p 5. Johnson *v.* Greaves, 2 Taunton, p. 344. Blackburn *v.* Thompson, 15 East, p. 81. Rose *v.* Himely, 4 Cranch, p. 272.

CHAPTER IX.

ON CAPTURE AND ITS INCIDENTS.

Duty of Captors to bring in their captures for adjudication as Prize—Enemies have no *locus standi* in a Prize Court—What is essential to constitute capture—Forms of proceeding in Great Britain to constitute Prize Courts—Jurisdiction of Courts to distribute Prize—Absolute Control of the Crown over all captures—Recapture subject to the *jus postliminii*—Rule of twenty-four hours' possession—Salvage on Recapture—Practice of Great Britain and of the United States of America—Practice of France, Spain, Denmark, Sweden, and Holland—Insurable interest of British captors—Ancient practice as to prisoners of war—Modern Cartels for the exchange of prisoners—Cartel Ships—Ransom of Captures at Sea—Ransom Bills—Hostages—Modern Restraints upon Ransom—Joint Captures—Distribution of Prize amongst joint Captors—Condemnation of Prizes brought into the port of an ally.

Duty of Captors to bring in their captures for adjudication as Prize.

§ 166. THE object of captures at sea having been originally to make Reprisals *ad damni dati modum*, and the right to make Reprisals ceasing upon sufficient security (pignoratio) having been taken to make good the damage, for which Letters of Reprisals had been granted by the Sovereign Power, it was an usual condition of Letters of Marque and Reprisals that the captures should be brought into port and submitted to the adjudication of a competent Court, in order that the validity of each capture should be determined, and permission be granted or refused to the captor to convert the property to his own use. Hence very different rules have been established in

regard to maritime captures from those which are applicable to captures on land. The nature of hostilities, which are carried on within an enemy's territory, requires that an invading army should not encumber itself with booty; and accordingly the Commander of an army carries with him authority to make immediate enquiry, and to determine summarily all questions of title to booty.

In very early times the Admiral of a fleet of armed cruisers determined in like manner the question of Prize or no Prize summarily, or, as it was said, *velis levatis*. The capturing vessel conducted its capture to the Admiral-Ship, upon the deck of which enquiry was made by inspecting the papers of the captured vessel and interrogating her master and crew, and thereupon the vessel and her cargo were adjudged to be good prize, or were forthwith allowed to pursue their voyage. Under the present practice of warfare upon the High Seas, it is the duty of the captors to send their captures to a convenient port of their own country or of an allied country, and to submit them immediately for enquiry and adjudication before a lawfully constituted Prize Court. If the captors should fail to do this, it is competent for the party who claims the ship and cargo to apply to a Prize Court of the captors' country for a Monition against the captors to proceed forthwith to adjudication; in which case if the captors should neglect to appear and proceed to adjudication, the Court may condemn them to make restitution with costs, and sometimes with damages. It is immaterial in such a case whether the captors have acted in good faith or not in making the capture. "If the captor," observes Lord Stowell[1], "has been guilty of no wilful misconduct, but has acted from

[1] The Actæon, 2 Dodson, p. 52.

error or mistake only, the suffering party is still entitled to full compensation, provided he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own Government, but still the person, to whom the property belonged, must not be a sufferer. As to *him* it is an injury, for which he is entitled to redress from the party who has inflicted it upon him; and if the captor has by the act of destruction conferred a benefit upon the public, he must look to the Government for his indemnity. The loss must not be permitted to fall upon the innocent sufferer."

§ 167. The personal obligation of a captor to bring his captures into port for enquiry and adjudication is founded upon the instructions, which he has received from the Government, which has authorised him to make captures. The obligation of every Government on the other hand to require its cruisers to bring their captures into port for adjudication before a competent Court of Prize rests upon the general Law of Nations. But this obligation under the common Law of Nations exists only with respect to vessels navigated under a Neutral flag, the object of the enquiry before a competent Court being to ascertain whether the captured property in each case belongs to a neutral or an enemy, and to restore the property if it belongs to a neutral, and so to restrain the captor in the eager pursuit of gain from doing injustice to innocent merchants, whereby national quarrels might arise. Enemies on the other hand have no *locus standi* in a Prize Court under the general Law of Nations, and they cannot claim of Right that their property upon capture by a belligerent cruiser should be taken into the port of the belligerent or his ally for enquiry and adjudication.

Enemies have no *locus standi* in a Prize Court.

Capture alone devests an enemy of his property *jure belli*. Upon the surrender of a vessel under an enemy's flag on the High Seas, a belligerent may destroy her under the general Law of Nations; and if the captor is unable to bring her into port, he will be justified towards his own Government in destroying her. The instruction of his own Government may indeed require him to bring into port every capture which he may make, but he may be actually engaged in a service, which will not allow him to put a prize crew on board the vessel which he has captured, in order that she may be taken into port. Under such a collision of duties, Lord Stowell has held that nothing is left to the belligerent vessel but to destroy the enemy vessel which she has taken; for she cannot consistently with her general duty to her own country, or indeed under its express injunctions, permit enemy's property to sail away unmolested. If it should be impossible to bring in, her next duty is to destroy enemy's property. When it is doubtful whether it is enemy's property, and it is impossible to bring it in, no such obligation arises, and the safe and proper course is to dismiss. When it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the captor's own State. To the neutral it can only be justified, under any such circumstances, by a full restitution in value[2].

What is essential to constitute a capture.

§ 168. In order to constitute a capture at sea, an act of taking possession is not absolutely necessary: the state of the weather alone may be such that the captor cannot safely take possession of the enemy's vessel, and yet he cannot with humanity continue hostilities, after the master and crew have signified

[2] The Felicity, 2 Dodson, p. 386.

their intention not to resist. The real surrender of the vessel is therefore held to take place when she lowers her flag. But there must be an intention manifested by the captor to make prize of the vessel, which has surrendered, by some act beyond that of compelling it to surrender, otherwise the capture will be regarded as abandoned by him in such a sense, that it may enure to the benefit of another party, who subsequently takes possession of the enemy's vessel. It is therefore the general rule for the commander of the vessel which has made a capture at sea to put a prize-master on board the captured vessel; but many captures have been held effectual where no man has been even put on board, but the ship only has been compelled to steer in the direction prescribed by the captor[3]. Lord Stowell has observed that "if a merchant vessel is obliged to lie to and obey the orders of the enemy-vessel, she is completely under the dominion of the enemy; and that if a captured vessel remains under the coercion of the guns of the captor, she is as much in his possession, as if the men, who were otherwise to work those guns, had been put on board." On the other hand it is a sufficient act of taking possession of a vessel, if a single man is put on board by the captors as prize-master. It is usual to put a prize-crew on board of sufficient strength to prevent any chance of a successful attempt to rescue the vessel; and sometimes a part of the crew of the captured vessel are taken out of her as a measure of precaution against their attempting to overpower the prize-crew; but it is competent for a captor, if he places confidence in the promise of the master of a captured vessel, to retain the possession of the prize as against all sub-

3 The Hercules, 2 Dodson, p. 368. The Edward and Mary, 3 Ch. Rob. p. 306.

sequent captors by placing a single man on board of her. "It is clear," says Mr. Justice Washington[4] in delivering the judgment of the Supreme Court of the United States, "that some act should be done indicative of an intention to seize and retain as prize; and it is always sufficient if such intention is fairly to be inferred from the conduct of the captor." Accordingly it was held by the Supreme Court that the presence of a single man on board, although he did not interfere with the navigation of the ship, has been sufficient to retain possession of a prize on behalf of the captor. Lord Stowell, to a similar purport, held that the presence of two men on board, although they had not taken possession of the ship's papers nor had interfered with the navigation of the vessel, was sufficient to retain possession of a prize in favour of the first captor against a privateer, which had seized the vessel a second time and put one man on board of her, as well as against a King's ship which had subsequently assisted to prevent the master of the captured vessel from carrying into effect his intention to take his vessel into an enemy's port. Upon the ground of the latter act of assistance the commander and crew of the King's ship attempted to maintain a title of capture, but the Court held that the assistance which they had afforded was only sufficient to found an interest on their behalf in the nature of a claim for military salvage, and decreed them only a salvage remuneration[5].

§ 169. The right to all captures is vested in the Sovereign Power, which has granted to the Commander of an armed ship a Commission to make capture of enemy's property; but the capture of

Forms of proceeding in Great Britain to constitute Prize Courts.

4 The Grotius, 9 Cranch, p. 370.

5 The Resolution, 6 Ch. Rob. 23.

such property may enure to the benefit of the actual captor by a grant from the Sovereign Power, and under such limitations and conditions as it may be pleased to impose. In Great Britain it is usual at the outset of war for the crown to issue in the first place an order in Council[6], granting General Reprisals "against the ships, vessels, and goods of the Enemy Sovereign and of his subjects and others inhabiting within any of his countries, territories, or dominions," so that her Majesty's Fleets and Ships may lawfully seize them and "bring the same to judgment in such Courts of Admiralty within her Majesty's dominions, possessions, or colonies, as shall be duly commissionated to take cognisance thereof." The Crown thereupon issues a Commission under the Great Seal (which is prepared by Her Majesty's Advocate General and Her Majesty's Advocate in her Office of Admiralty) addressed to the Lord High Admiral, or the Commissioners for executing his office, authorising him or them to require the High Court of Admiralty of England and the Lieutenant or Judge thereof, as also the several Courts of Admiralty within her Majesty's dominions, which shall be duly commissionated, to take cognisance of and judicially proceed against all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same, and according to the course of the Admiralty and the Law of Nations to adjudge and condemn all ships, vessels, and goods as shall belong to the Enemy Sovereign, or his subjects, or others inhabiting within any of his countries, territories, or dominions. Instructions are subsequently prepared by the same Law Officers, and are issued to the several Courts of Admiralty

[6] Order in Council of 29 March 1854.

within her Majesty's dominions for their guidance. Under the authority of the Commission issued pursuant to such Order in Council, the Lord High Admiral or the Commissioners for executing his office issue a Warrant to the Judge of the High Court of Admiralty, who is thereby authorised to adjudicate upon all captures, seizures, prizes, and reprisals, of all ships, vessels, and goods, according to the course of its established practice; and it is not necessary for the High Court of Admiralty to obtain the direct sanction of the Legislature to enable it to act as a Court of Prize. Lord Stowell has observed that "it is the common practice of European States in every war to issue proclamations and edicts on the subject of Prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed from habit and ancient practice, as regularly as afterwards they conform to the express regulations of their Prize Acts[7]. The original and exclusive Jurisdiction of Courts of Admiralty over questions of Prize or no Prize, and who are the captors, notwithstanding any of the Prize Acts, has also been repeatedly recognised by the Common Law Courts at Westminster[8].

Jurisdiction of Courts to distribute Prize.

§ 170. It is competent for the Legislature of every country to grant to its Courts of Admiralty a jurisdiction over questions, which they do not possess by Ancient Usage; as for instance, a jurisdiction to distribute the proceeds of prize amongst the captors in certain fixed proportions. On the other hand, the Legislature of a country may restrain its Courts of Admiralty from proceeding in certain matters according to the general Law of the Admiralty; as for in-

7 The Santa Cruz, 1 Ch. Rob. p. 62.

8 Lord Camden and others *v.* Home in Error, 4 Term Reports, p. 382. Lindo *v.* Rodney, 3 Term Reports, p. 613.

stance, British Courts of Admiralty are restrained by the Prize Acts from restoring British vessels to their former owners on the payment of military salvage to the recaptors, wherever "such vessels have been set forth or used as ships or vessels of war by the enemy[9];" the *jus postliminii* is in such cases not recognised. Prior to the sixth year of the reign of Queen Anne the Legislature had not been accustomed to interpose its authority under the form of a general Prize Act, but the Statute (6 Anne, c. 13.) called the Cruisers' Act, which established as a branch of the Royal Navy a permanent fleet of cruising ships, expressly to furnish convoys to merchant vessels, had also for its object to vest the sole interest in all captures made by the King's ships or privateers in the actual captors after final adjudicature in a Court of Admiralty. The Law, as it stood with respect to the right of prize before 6 Anne, c. 13[10], may be thus stated. Whatever was taken by any subject of the Crown of England from an enemy in the course of naval operations was Prize of War, and appertained to the Sovereign either *jure coronæ*, or *jure admiralitatis*, according to circumstances. For instance, if a capture should have happened to be made by a private ship not furnished with a Commission from the Crown, the prize belonged to the Lord High Admiral. Such was the decision of the Council held by King Charles II at Worcester House on 6 March 1665–6 for determining the rights of the Lord High Admiral[11]. But the state of the law thereby recognised was found to work prejudicial effects in dis-

9 The Ceylon, 1 Dodson, p. 106.

10 There was a further Statute (13 Anne, c. 37.) called the American Act, passed for the regulation of Vice Admiralty Courts. Brymer *v.* Atkins, 1 H. Blackstone's Reports, p. 189.

11 The declaration of the King in Council will be found in Hay and Marriott's Reports, p. 50, and likewise in a note to the Rebeckah, 1 Ch. Rob. p. 231.

couraging merchant vessels from resisting the attacks of enemy-cruisers; and accordingly a Statute[12] was soon afterwards passed, under which a merchant ship which had been attacked by and had captured an enemy's cruiser, was declared to be entitled to the same share as a private man-of-war. On the other hand, if a capture should have been made by a private vessel having a Commission to make Reprisals, one tenth[13] of the prize went to the Lord High Admiral, or to the Sovereign *jure admiralitatis*, and the rest was for the benefit of the privateer. Sir Leoline Jenkins, in commenting upon a claim of the Lord High Admiral to the tenth of all prizes, observes, "There is no mention in the Lord Admiral's Patent of these tenths, nor is there any constant uninterrupted custom alleged for them, except in the case of private men of war, from whom the Lord Admiral doth receive his tenths. That the Earl of Warwick had them given him by the late usurpers from the public ships likewise, is yet fresh in memory; and that after they had extinguished the name and office of Admiral (as much as in them lay), they sequestered the tenths, as a distinct thing in the *provenue* of their prizes, and applied them to different uses from the rest[14]." The custom accordingly of the Lord Admiral's tenth would thus appear to have been confined in England to prizes taken by private ships, and was most probably a tradition of a period earlier than the Black Book of the Admiralty[15]. In France,

[12] 16 Car. II. c. 6.; also 21 and 22 Car. II. c. 11.

[13] The Dixième of the Admiral is recognised in the Ordonnance of Charles VI of France, 7 Dec. 1400. Lebeau, Nouveau Code des Prises, Tom. I. p. 4.

[14] Letter of Sir L. Jenkins to the King in Council. (Wynn's Life of Jenkins, Vol. II. p. 766.

[15] There is no trace of any proportionate share for the Admiral to be found amongst the provisions of the Black Book, which certainly is more ancient than King Edward the Third's time:

on the other hand, the Admiral for his support, and in consideration of the dignity of his place, and the importance of his services, had in the year 1400 A. D. " son droit de dixième ;" which in 1582[16] was confirmed to him as an established right, not only over all prizes whatever, but over all prisoners. The Statute 4 and 5 William and Mary, c. 25, § 18, gave to privateers the sole interest in all vessels captured by them, without a deduction of the tenth for the Lord High Admiral or the Commissioners for executing his Office. The same Statute gave to privateers four fifths of the cargo, and to King's ships one third of the proceeds of each capture. It was however felt in the next ensuing reign that prize matters ought to be placed on a more liberal footing, as comparisons were drawn, by which the situation of naval officers in the service of France was made out to be more advantageous than the situation of officers in the service of England; so that on the breaking out of hostilities with France, a Royal proclamation was issued by Queen Anne on 1 June 1702, giving to her Majesty's ships half, and to privateers the whole interest in the prize; but no general Parliamentary regulation during that war appears to have been passed on the subject prior to the Statute 6 Anne, c. 13, in 1708. By this Statute the sole interest in the prize was granted both to King's ships and to privateers after condemnation in a Court of Admiralty. A similar policy appears to have been adopted

but in the chapters " sur les Armemens en Course," which are probably of a date earlier than 1330, and are annexed to most of the editions of the Consolato del Mare, we find a provision that the Admiral was to have from twenty to forty parts, according to agreement with the parties, who might have fitted out the vessels. (Pardessus, Lois Maritimes, Tom. V. p. 417.)

[16] Letters Patent of Henri III. (16 August 1582.) Lebeau, Tom. I. p. 18.

by other States about the same time. The Swedish Ordinance[17] of 1715 granted in like manner the whole benefit of prize after condemnation to the actual captor. The Statute of Anne further provided that the proceeds of each prize should be distributed amongst the captors according to their respective shares, in manner, form, and proportion, as by her Majesty's most gracious proclamation to be issued for that purpose shall be directed and appointed, any law, statute, provision, or declaration to the contrary thereof in any wise notwithstanding. Wherever therefore the capture is made by the King's ships or forces, the interest in the prize is vested in the Sovereign *jure coronæ* until final adjudication. In such cases the property is adjudged by the Court of Admiralty as lawful prize to the Crown, whereupon the Prize Act comes into operation, and transfers the interest of the Crown, after adjudication, to the captors.

Absolute control of the Crown over all captures.

§ 171. As the Prize Acts only vest in the captors the interest of the Crown, after the captures have been adjudicated to be good Prize of War, it is competent for the Crown at any time before adjudication to renounce its interest in any capture, and to direct it to be given up altogether to the claimants, even after prize proceedings have been instituted by the captors. "Prize," says Lord Stowell, "is a creature of the Crown. No man has or can have any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The Right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal

[17] Collectanea Maritima, p. 175.

of those acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our Constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Parta bello cedunt reipublicæ*[18]." Lord Stowell accordingly held, that as the Prize Act and the Royal Proclamation did not give the property to the actual captors until after final adjudication, the Crown could at any time before adjudication declare, that property which had been seized under the general Order of Reprisals, should not be further proceeded against as enemy's property, and could direct it to be released. The practice on such occasions prior to the Prize Act of 1708 appears to have been for the Crown to issue an Order in Council directing the release of the property seized[19]; but subsequently to 1708 it would seem that the Lords of the Admiralty have been accustomed to issue to the captors personally an Order for the release of the property captured by them.

Recaptures subject to the *jus postliminii*.

§ 172. Every capture of a vessel is complete as between the belligerents when the surrender has taken place, and the *spes recuperandi* is gone; but as between the original owner of the vessel and a third party in respect of the *jus postliminii*, if the vessel should be recaptured, or as between the captor of the vessel and a third party in respect of the right of the former to dispose of the vessel in favour of the latter, by sale or otherwise, positive rules have been introduced, partly from equity, to extend the *jus postliminii* in favour of the original owner; partly from policy, to prevent any irregular conversion of

[18] The Elsebe, 5 Ch. Rob. p. 184.

[19] Various instances of such orders are cited in a note to the Elsebe, 5 Ch. Rob. p. 189.

property, before it has been ascertained to have been lawfully acquired *jure belli*. It was a provision of the Consolato del Mare[20], that if a ship and cargo which had been captured by the enemy, should have been recaptured by a friendly ship, the recaptor ought to restore the ship and cargo to those who were on board of her, if there should be any persons found on board still alive; but in such a case the recaptor ought to receive a sufficient recompense for his trouble, and for any damage which he might have incurred. But this applies only to those cases in which the recaptor has retaken his prize within the jurisdiction and in the waters of the country, to which the ship belongs, or else in a roadstead where the captors have not yet moored their prize, that is, have not placed her in safety; otherwise if the prize had been already carried into a place of safety by the captors, it is not a case for receiving a recompense; but on the contrary it is consistent with justice that the vessel and her cargo ought to belong to the recaptors. Such is the language of the Consolato del Mare on the subject of the recapture of vessels and their cargoes; and such seems to have been the ancient law of Maritime Capture amongst the Nations of Europe, in accordance with the principle of the Roman law, as applicable to persons captured by the enemy, *antequam in præsidia perducatur hostium, manet civis*[21]. "By the consent of Nations," says Grotius, "things are said to be taken in war, when they are so detained, that the first owner has lost all probable hope of recovering them, and cannot pursue them, as Pomponius determines a like question. This takes place when they are brought within the boun-

[20] Chapitre 295 (290) Du navire pris et repris. (Pardessus, Lois Maritimes, Tom. II. p. 339.

[21] Digest. L. XLIX. Tit. XV. c. 5. § 1.

daries, that is, within the stronghold (*præsidia*) of the enemy[22]."

Rule of Twenty-Four hours possession.

§ 173. "Under the Law of Nations," says Grotius, "which is applicable to such matters, the case is the same with regard to goods as to persons, whereby we may easily perceive how, when things are said to belong immediately to the captors, it is to be understood, with a certain reservation, that they continue in their possession until they are brought *infra præsidia:* whence it seems to follow, that at sea ships and other things are then only said to be captured when they are brought into the enemy's docks or ports, or into that place where his whole fleet is riding, for thereupon their recovery may be despaired of. But we find that under a more recent Law of Nations it has become the rule amongst European Nations to account such things to be captured, when they have been in possession of the enemy during twenty-four hours[23]." To the same purpose Lord Stowell has observed, "It cannot be forgotten that by the ancient Law of Europe, the *perductio infra præsidia, infra locum tutum,* was a sufficient conversion of the property; that by a later law a possession of twenty-four hours was sufficient to devest the former owner[24]." The rule that the continuous possession of a ship and cargo on the part of the enemy for twenty-four hours should debar the original owner of the *jus*

[22] Ceterum in hac belli quæstione placuit gentibus, ut cepisse rem is intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit, aut ut res persecutionem effugerit, ut loquitur in simili quæstione Pomponius. Hoc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id est, præsidia hostium perducta fuerint. (De Jur. B. et P. L. III. cap. 6. § 111. 1.

[23] Recentiore Jure Gentium inter Europæos populos introductum videmus, ut talia capta censeantur, ubi per horas viginti quatuor in potestate hostium fuerint. Ibid. § 111. 2.

[24] The Ceylon, 1 Dodson, p. 116.

postliminii, in other words, should deprive him of all right to reclaim possession of his former ship and cargo, on payment of military salvage to the recaptor, or as Bynkershoek terms it *salvo servaticio*, seems to have been borrowed from the Laws of the Lombards, and was established after the analogy of the four and twenty hours, which, not without reason, was the limit of time, within which a hunter who had wounded a beast might recover possession of it, if it had been taken by another[25]. This rule may be said to have been generally recognised amongst European Nations until the middle of the seventeenth century. Albericus Gentilis speaks of it as the Law of Castile in his day, and it is the Law of the kingdom of Spain in the present day. Lord Stair in his decisions says it is the rule of Law in Scotland. Valin states that a similar practice prevailed in his time in France, and the Law of France in the present day accords with that practice. Crompton, in his treatise on the jurisdiction of Courts, says that it was the ancient Law of England, and that a possession of twenty-four hours on the part of the enemy was a sufficient conversion of property. It has been disputed whether the passage in Crompton applies to maritime capture, although Lord Stowell interprets it in that sense[26]; but there is a specific assertion in Thurloe's State Papers[27] on the part of the Dutch Resident at the Court of St. James in 1656, that

[25] Si cervus aut quælibet fera ab aliquo homine sagittata fuerit, tam diu illius esse intelligatur, qui eam sagittaverit aut vulneraverit, usque ad aliam talem horam diei aut noctis, quæ sunt horæ viginti quatuor, quando eam postposuerit, et se ab ea tornaverit; nam qui eam post transactas horas prædictas invenerit, non sit culpabilis si sibi habeat ipsam feram. Leges Longobardorum, Tit. XXII. § 6. Lindenbrogii Codex Legum Antiquarum, Tom. I. p. 558.

[26] The Ceylon, 1 Dodson, p. 118.

[27] Thurloe, Tom. IV. p. 589.

after many suits, and afterwards appeals, had in the Council of the King anno 1632, it was understood that *jure postliminii* no ships ought to be restored, which had been twenty-four hours in the power of the latter. In Denmark the Maritime Code of Christian V (1670–1699) ordains that if an armed ship recaptures a Danish ship, which has been in the possession of the enemy for twenty-four hours, the recaptors shall have the exclusive benefit.

Salvage on Recapture. Practice of Great Britain and of the United States of America.

§ 174. It is within the province of the Legislature of every country to regulate by its municipal law all questions of recapture, which may arise between its own citizens. We find accordingly that in England during the Commonwealth a departure was made from the general Law of Europe in favour of merchants by the Ordinance of 1649, which directed a restitution of all vessels by British recaptors to British subjects upon payment of salvage; and a like indulgence has been continued in successive Prize Acts down to the present day, the only exception being made in the case in which the enemy has fitted out his prize as a man-of-war[28]. It will be sufficient to bring a vessel within this exception, and to leave her subject to the operation of the general Law, if she should have been fitted out as a privateer by the enemy, although she may be navigating as a merchant vessel at the time of her recapture[29]. But it will not be sufficient to deprive her of the protection of the Prize Act, that she should have an additional number of men put on board of her by the captor. A vessel originally armed as a slave ship was captured by a privateer, who put men on board of her; but Lord Stowell held, that as there was no Commis-

[28] Nostra Signora del Rosario, ibid. p. 401.
3 Ch. Rob. p. 10. The Ceylon,
1 Dodson, p. 105. The Georgiana,

[29] L'Actif, Edwards, p. 186.

sion of War, no arming of the vessel, the mere fact of putting an additional number of men on board did not have the effect of defeating the title of the original owner[30]. The practice of Great Britain has been adopted, as the rule of their decisions, by the Courts of the United States of America. But the regulations of the Municipal Law of a State are not applied to cases of recapture, when the property of Neutrals is concerned. The rule of reciprocity was followed by Lord Stowell in the case of a Portuguese vessel[31], and so in the United States, the Salvage Act of 1800 declared that upon the recapture of neutral property, the rule of reciprocity was to prevail. If the Courts of Neutral States would in the like case restore on salvage, then the American Courts were to restore on the same salvage; if otherwise, then they were to condemn to the recaptors[32]. Thus in the case of an American vessel, which had been recaptured from the British by an American privateer, with a valuable cargo on board, the property of French subjects, the Supreme Court of the United States decreed the ship to be restored to the American owners, on payment of salvage to the recaptors, but condemned the cargo as good prize to the captors on the principle of reciprocity, inasmuch as French Courts award to recaptors the entire property, whether it belongs to French subjects, to allies, or to neutrals, in all cases of recapture, after the property has been twenty-four hours in the possession of the enemy[33].

§ 175. There are notable differences to be observed in the manner in which the different States of Europe administer the *jus postliminii*, under the provi- Practice of France, Spain, Denmark, Sweden, and Holland.

30 The Horatio, 6 Ch. Rob. p. 320.

31 The Santa Cruz, 1 Ch. Rob. p. 50.

32 The Star, 3 Wheaton, p. 92.

33 The Schooner Adeline and her Cargo, 9 Cranch, p. 244.

sions of their Municipal Law in the case of property recaptured at sea, although the tendency of all modern legislation is in favour of a milder practice, than that which had been generally received before the commencement of the seventeenth century, after the analogy which the Law of the Lombards supplied. The French Arrête of 2 Prairial, an. XI. provided, that if the recapture should have been made by a public ship of war, it should be restored to the original owner on the payment of one thirtieth of its value by way of salvage, if it had been recaptured within twenty-four hours; or of one tenth of its value, if twenty-four had elapsed, the original owners being liable to defray the expenses attending the recapture. If, on the other hand, the recapture had been made by a private ship of war before the lapse of twenty-four hours, the recaptors would be entitled to a salvage of one third; if after the vessel had been twenty-four hours in possession of the enemy, the recaptors would be entitled to the whole as prize. The rule of the French Courts is the same, whether the property recaptured belongs to neutrals, or to French subjects. In Spain the Ordinance of 1801 makes a distinction between the property of Spanish subjects and the property of the subjects of friendly Nations. The rule in regard to the former is, that if the property is recaptured within twenty-four hours, a salvage of one third shall be paid to the recaptors; but if after that time, the recaptors shall take the property as prize. But in regard to the latter, the recaptured ship, unless it be laden with enemy's property, is to be restored on payment of one eighth of its value, as salvage, if recaptured by a public ship; and of one sixth of its value, if recaptured by a privateer; subject however to the condition, that the Courts of the State, under whose flag the vessel sails, should observe the same

rule in regard to Spanish property. Portugal, by an Ordinance of 1797, decreed that restitution should be made of property recaptured after twenty-four hours on salvage of one eighth to a public ship, and of one fifth to a privateer. Denmark, by an Ordinance of 1810, decreed the property of Danish subjects and of allies to be restored without any regard to the length of time which might have elapsed since its capture, on payment of one third of its value, as salvage, to the recaptors. In Sweden the Ordinance of 1788 enacted that if a Swedish vessel should be recaptured from the enemy, the recaptor should have half her value without respect to the time during which she had been in the possession of the enemy. In Holland the law has undergone great modifications, but at present restitution to the original owners is to be made in all cases, subject to different rates of salvage. Thus the Ordinance of 1659 decreed the restitution of the recaptured property to the original owners in every case, on payment to the recaptors of one ninth of the value, and such continues to be the rule of the Courts in the case of recaptures by public vessels; but in regard to privateers, a later Ordinance of 1677 has decreed to them a salvage of one fifth, if the property should have been recaptured within forty-eight hours; of one third, if it should be recaptured after forty-eight and within ninety-six hours; and of one half, if recaptured after ninety-six hours.

Insurable interest of British captors.

§ 176. All captures *jure belli* are consummated under the Natural Law of Nations by surrender (deditio), in the sense in which a capture enures to the benefit of the Sovereign Power which has authorised the capture[34]; but in the sense in which

34 In conformity with the rules of the Roman Law, "per solam occupationem dominium prædæ hostibus acquiri," which

a capture enures to the benefit of the actual captor under the Municipal Law of a civilised State, the title of the captor is not complete until it has been submitted to and sanctioned by a Court of Prize. "In later times," says Lord Stowell, "an additional formality has been required, that of a sentence of condemnation in a competent Court, decreeing the capture to have been rightly made *jure belli:* it not being thought fit in civilised society that property of this sort should be converted without the sentence of a competent Court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require that such exercises of war shall be placed under public inspection, and therefore the mere *deductio infra præsidia* has not been deemed sufficient." In accordance with his principle, the actual captors under the British Prize Acts have no formal interest in their captures until after final adjudication of them, as Prize, by the sentence of a competent Court, although they have been held to have an insurable interest in them immediately after capture. If the actual captor might be regarded as a trustee for the Crown to bring his captures as soon as possible into port, in order that a competent Prize Court might adjudicate upon them, the captor would have an insurable interest in his character of trustee; for such was the purport of the judgment of the House of Lords[35], in the case of the Commissioners appointed under 35 Geo. III. c. 80, for the purpose of taking care of and disposing of Dutch ships and effects

Lord Mansfield has discussed in Goss *v.* Withers, 2 Burrows, p. 683.

35 Crawford *v.* Lucena, 3 B. and P. in the Exchequer Chamber, and 2 N. R. 269 in the House of Lords. Park on Insurance, II. p. 571.

captured at sea by his Majesty's ships of war and brought into the ports of Great Britain. The Lords decided on that occasion that the Commissioners might insure in their own name in the right of trustees for the Crown. But with regard to actual captors, they have been adjudged to have an insurable interest on other and different grounds. In one case Lord Mansfield[36] held that the captor had under the Prize Act and Proclamation such certain expectation of profit upon the safe arrival of his prize in port, that it gave him an insurable interest in its arrival; whilst in another case Lord Kenyon, Mr. Justice Grose, and Mr. Justice Lawrence, were of opinion that as the captor has the risk of being condemned in costs and damages, if the capture is pronounced to have been unjustifiable, he has a right to insure against that risk[37].

Ancient practice as to prisoners of war.

§ 177. It was formerly the practice of belligerent States to leave to every prisoner of war the care of redeeming himself from captivity, and the captor in each case had a lawful right to demand a ransom for his prisoner. The practice of ransom was in fact a mitigation of the earlier practice under which a prisoner of war became the slave of the captor, and which practice Grotius[38] recognises as conformable to the Law of Nations. But Grotius has at the same time pointed out, that this Law of Nations had

[36] Le Cras *v.* Hughes, East, 22 G. III.

[37] Boehm *v.* Bell, 8 T. R. 154. The Nemesis, Edwards, p. 50.

[38] At eo, de quo nunc agimus, gentium jure aliquanto latius patet servitus, tum quoad personas, tum quoad effectus. Nam personas si spectamus, non soli qui se dedunt aut servitutem promittunt, pro servis habentur, sed omnes omnino bello solemni publice capti, ex quo scilicet intra præsidia perducti sunt, ut ait Pomponius. Neque delictum requiritur, sed hæc omnium sors est, etiam eorum qui fato suo, ut diximus, cum bellum repente exortum esset, intra hostium fines deprehenduntur. De Jure B. et P. L. III. c. 7. § 1 and 2.

neither been received at all times, nor amongst all Nations, although the language of the Roman jurists on the subject is general, and that an advance has been made in the practice of mankind in the treatment of captives from reverence for the law of Christ. "But even Christian Nations have maintained the practice of detaining prisoners of war in captivity, until a price is paid for them, of which the captor is accustomed to form an estimate at his pleasure, unless there has been some Convention entered into on the subject[39]." Notwithstanding the mitigating influences which the profession of the same Religion by both the belligerent parties, and more especially the profession of the Christian Religion, has been found in practice to exercise over the conduct of hostilities, it has been found necessary, within so recent a period as the commencement of the seventeenth century, to stipulate by treaties that prisoners of war should not be detained as galley-slaves after the war has terminated. Thus it was stipulated in the treaty of 1604[40] between England and Spain, that prisoners of war on either side should be released, although they had been condemned to the galleys. An article in similar terms was introduced into the treaty of 1630 between England and Spain[41]. It would appear from the 101st article of the Treaty of the Pyrenees, concluded in 1659, between France and Spain, that at that time the practice of condemning prisoners of war to the galleys was not altogether abandoned[42]. This practice however was evidently becoming obsolete before the conclusion

39 Manet etiam inter Christianos mos captos custodiendi donec persolutum sit pretium, cujus æstimatio in arbitrio est victoris, nisi certi aliquid convenerit. De Jure Belli et Pacis, L. III. c. 7. § 9. 2.

40 Dumont, Corps Diplomatique, Tom. V. Part II. p. 38.

41 Ibid, p. 623.

42 Dumont, Tom. VI. Part II. p. 278.

of the seventeenth century, for we find that when Count Solmes, who was serving under William of Orange in Ireland in 1690, threatened to deport his prisoners as slaves to America, the Duke of Berwick threatened to retaliate by sending his prisoners to the galleys in France[43]. Bynkershoek, in commenting on the conduct of the Dutch in 1602, in liberating certain prisoners of war whom their friends would not ransom, observes that it would have been foreign to the manners of that age *moribus, qui nunc frequentantur, alienum*, to have put them to death, or to have sold them as slaves, although he remarks that the Dutch are accustomed to sell, as slaves, to the Spaniards all prisoners of war belonging to Algiers, Tunis, or Tripoli; and that the States General had ordered their Admiral in 1661 to sell, as slaves, all pirates whom he might capture at sea. From a proclamation of Charles I of 23 July 1628, we may infer two facts; first, that a practice of exchanging prisoners during war was growing up; and secondly, that the private interest of the actual captor in his prisoners had not been entirely devested at that time, as we find all prisoners brought into the kingdom by private men were to be kept in prison at the charge of the captors, until they should be delivered by way of exchange or otherwise[44]. At a later period of the same century we arrive at greater certainty; for we find in the year 1666 mention made by D'Estrades[45] of a person coming to England in a public capacity from Holland, to negotiate an exchange of prisoners between England and Holland then at war. It seems not improbable that Humanity is indebted to the Dutch

43 Bynkershoek, Qu. Jur. Publ. L. I. c. 3. p. 1035.

44 Rymer, Fœdera, Tom. XVIII.

45 Lettres de M. le Comte d'Estrades, Tom. III. p. 475.

for initiating the modern practice of exchanging prisoners, whilst war was going on[46].

Modern Cartels for the exchange of prisoners.

§ 178. It was amongst the provisions (Art. LXIII.) of the Peace of Munster (A.D. 1648) that all prisoners of war should be released on both sides without ransom and without any distinction or reservation; and it is from about the same period that we may date the introduction of *cartels* in Europe for the release of prisoners at a fixed rate of ransom, whilst war is going on. It is not unusual in the present day for two States which are engaged in war against each other to enter into an agreement, which is termed a Cartel, either for the exchange of prisoners, or for their ransom at fixed rates. Such a Cartel was agreed upon on 26 March 1673 between the Duke of Luxemburg on the part of Louis XIV and Count Horn on the part of the States General, under which a proportionate scale of money prices was settled for the ransom of officers and soldiers according to their respective grades, in cases where there was no officer or soldier of equal grade, who could be released in exchange[47]. All medical and surgical officers with their servants were to be released without ransom. Similar Cartels were made between the French and the Dutch in 1675[48], and between the Emperor Leopold and Louis XIV in 1692[49], and between the French and the Imperial armies in Italy in 1701[50]. It is not unusual in modern Cartels to stipulate, not merely for the ransom of prisoners for a pecuniary equivalent, if no exchange of prisoners of equal grade can be effected, but to stipulate for

46 3 Ch. Robinson's Reports, Appendix A.

47 Dumont, Corps Diplomatique, Tom. VII. Part I. p. 230.

48 Ibid. p. 292.

49 Tom. VII. Part II. p. 310.

50 Martens, Récueil, Tom. III. p. 310.

the ransom of prisoners for a personal equivalent, as for instance in the Cartel of 1780[51] agreed upon between France and Great Britain, a Field Marshal was to be ransomed for sixty pounds sterling, or for sixty private soldiers, each private soldier being allowed to be ransomed for one pound sterling. A Cartel for the exchange of prisoners during war was agreed to between Great Britain and the United States in 1813, under which the same principle was adopted of exchanging prisoners not merely for prisoners of equal rank, but for equivalents in men[52]. During the war of the Allied Powers against Russia (1854-56) frequent exchanges of prisoners took place, and it was agreed, under a special convention between France and England, that whenever the two allied Governments should agree to an exchange of prisoners with the Enemy, no distinction should be made between their respective subjects who might have fallen into the hands of the Enemy, but their liberation should be effected according to the priority of their respective capture, except under special circumstances, which were reserved for the mutual consideration of the two Governments[53]. It seems to have been thought necessary even in the Treaty of Paris (30 March 1856) to stipulate that the prisoners of war on both sides should be immediately released[54]. It is advisable that such a provision should be introduced *ex majori cautela* into all Treaties, even between Powers which do not recognise the *status* of domestic slavery. Dr. Phillimore has very justly observed, that if prisoners are not released during the war, their freedom should

[51] Lamberty's Memoirs, Tom. I. p. 694.

[52] National Advocate, May 26, 1813.

[53] Convention of 10 May 1854. Martens, N. R. Gén. XV. p. 505.

[54] Les prisonniers de guerr seront immédiatement rendus de part et d'autre. Ibid. p. 774.

always form one of the conditions of the peace which terminates it[55].

Cartel Ships.

§ 179. The Cartel of 1813, between Great Britain and the United States, provided that American Agents might reside at Halifax and other places, and British Agents at various places within the United States. It is usual, and obviously of the last importance for carrying out the objects of a Cartel, that a Commissary of prisoners should reside in the country of the Enemy; and it is competent for him to grant a pass or special safe conduct *eundo et redeundo* to ships employed in conveying prisoners who have been exchanged or ransomed[56]. Such ships are denominated *Cartel Ships*. The employment of such ships, whilst it is entitled to every favourable consideration upon the same principles as all other *commercia belli*, by which the violence of war may be allayed, as far as is consistent with its purposes, must be conducted with very delicate honour on both sides, so as to leave no ground for suspicion, that a practice introduced for the common benefit of mankind should be made a stratagem of war, or become liable to fraudulent abuse. In general, when a ship is going on a Cartel, unless there has been a stipulation as to the character of the ships to be so employed, it is immaterial whether she is a merchant ship or a ship of war; but a Cartel ship has no right to trade by carrying either merchandise or passengers for hire[57]; neither is a ship protected

55 Commentaries upon International Law, III. p. 145.

56 The Daifjie, 3 Ch. Rob. p. 143.

57 The Venus, 4 Ch. Rob. p. 355. Lord Stowell condemned as a Droit of Admiralty some cargo which had been shipped at Dover on board of a French Cartel ship, which was lying near the quay with her sails set and ready to sail back to France. La Rosine, 2 Ch. Rob. p. 373.

from capture when she is proceeding to a port for the purpose of taking upon herself the character of a Cartel ship when she arrives at such port; but she is protected from capture in returning from a port of the enemy to which she has conveyed prisoners of war, until she has arrived at a port of her own country, for she is protected in the whole *trajectus* between the ports of the two belligerents. There are cases in which the privileges of Cartel have been allowed to vessels employed in carrying prisoners of war back to their own country agreeably to an understanding with the commander of the enemy-forces, although such vessels have not been provided with the formal documents of Cartel. Lord Stowell held that in such a case a Prize Court was placed under an obligation to support the good faith of an agreement, on which the other party had acted with confidence[58].

Ransom of Captures at Sea.

§ 180. The Ransom of Captures at sea comes under different considerations of Law from the ransom of prisoners of war. In the latter case the person of the captive has been brought *infra præsidia*, but with regard to capture at sea circumstances will frequently not permit a captor to bring or send his prize into port. In such a case he may destroy the property of his enemy *jure belli*. Being thus of Right *dominus* of the property which he has taken, he may restore it, if he sees fit, to the owner on an agreement on the part of the latter to pay a specific sum of money by way of ransom[59]. The right of every captor to restore a captured ship and cargo upon ransom is not founded on a formal vested title in the captor to the captured property. Mr. Justice

[58] The Gloire, 5 Ch. Rob. p. 93.

[59] Emérigon, Traité des Assurances, c. 12. § 21. Consolato del Mare, c. 227, 228. Guidon, c. 6. § Art. 2, 3, 7, and 9.

Story[60] has observed that "whether the property vests after twenty-four hours' possession; or after bringing *infra præsidia*, as seems the doctrine of the Civilians; or after condemnation, as is the doctrine of Great Britain; it is clear that the right to take a ransom exists from the moment of capture. And by the general practice of the maritime world, a decree of condemnation is deemed necessary to ascertain and confirm the inchoate title of the captors, at least in respect to the Sovereign and subjects of their own country. Nor is a ransom, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudication of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. In this respect there seems to be no legal difference between the case of a ransom of the property of an enemy, and of a neutral. For if the property be neutral, and yet there be a probable cause of capture, or if the delinquency be such, that the penalty of confiscation might be justly applied, there can be no intrinsic difficulty in supporting a contract, by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid, or agreed to be paid, by the captured."

Ransom Bills.

§ 181. The captor, when he restores a captured vessel to its commander under a Contract of Ransom, takes from the latter what is termed a *ransom bill*, under which the latter binds himself and the owner of the vessel and cargo to pay a certain sum of money at a future day named in the bill. This contract is usually made in duplicate, one of which is kept by

[60] Maissonnaire and others *v.* Keating, 2 Gallison, p. 337.

the captor, and is properly termed the Ransom Bill, and the other is given to the master of the captured vessel, and serves as a Pass or Safe-conduct for him. The master of the captured vessel at the same time delivers up to the captor one of his crew, generally the mate of his vessel, as a hostage for the payment of the money stipulated in the Ransom Bill. The ransomed vessel is thereupon permitted to proceed to a designated port by a prescribed route and within a limited time. A failure to comply with any of these conditions places the vessel and her cargo out of the protection of the ransom bill, otherwise the ransom bill serves to secure the vessel and her cargo from all molestation from the cruisers of the belligerent state of which the captor is a subject, or from the cruisers of its allies, until she has reached the port of her destination. It has been justly observed that all compacts with the common enemy must bind allies, when they tend to accomplish the object of the alliance; otherwise the ally would reap all the fruits of the compact without being subject to the terms and conditions of it, and the enemy with whom the agreement was made would be exposed in regard to the ally to all the disadvantages of it, without participating in the stipulated benefit. Such an inequality of obligation is contrary to every principle of reason and justice[61]. If the vessel should be forced out of the course prescribed, or her voyage should exceed the time allowed in the ransom bill owing to stress of weather or some overpowering necessity, such a circumstance will not work a forfeiture of her safe-conduct; but if she should have no such excuse for her non-observance of the conditions of her ransom, and should be captured a second time, she is

[61] Kent's Commentaries, Tom. I. p. 105. Miller *v.* The Resolution, 2 Dallas, p. 15. Yates *v.* Hall, 1 Term Rep. p. 73.

liable to be adjudged good prize to the second captors, in which case the debtors under the bill of ransom will be discharged from their contract, and the amount stipulated in her bill of ransom will be deducted from the total proceeds of the prize, the residue only going to the second captor[62]. On the other hand, if the vessel of the captors should be taken by the enemy with the ransom bill and hostage on board, the ransom bill is thereby discharged, and it cannot be revived by recapture[63]. So when the vessel of the captor, after he has transmitted the ransom bill, is taken with the hostage on board, the ransom is discharged by such recapture of the hostage[64]. But if the hostage and the ransom bill have both been transmitted by the captor to a place of safety, and the captor's vessel be subsequently taken by the enemy, the ransom remains due notwithstanding such capture. In such a case there is nothing on board the captor's vessel that represents the ransom of the captured vessel; and where the hostage and ransom bill have both been conveyed to a place of safety it is equivalent to the prize itself having been carried *infra præsidia*. So if the commander of a privateer should have ransomed an enemy's vessel, under a condition, amongst others inserted in the ransom bill, that the full amount should be paid notwithstanding "the hostage should come to die, or to desert, or that the said privateer should perish or be taken with the hostage on board," and the privateer should have been subsequently captured by the enemy with the hostage and ransom bill on board, but the ransom bill should not have been delivered up to the captors of the

[62] Valin, Traité des Prises, c. 11. § 1–3. Pothier, Traité de Proprieté, § 134–137.

[63] Emérigon, Traité des Assurances, c. 12. sect. 23. § 8.

[64] Ibid.

privateer, nor have ever come into their possession, the original captor has been held entitled to recover on the ransom bill[65]. So likewise if the commander of the ransomed vessel should have given a bill of exchange to the captor as an additional security, together with the ransom bill, and the bill of exchange should have been negotiated in good faith to the order of a third party for value received, it is to be paid by the owners of the ransomed vessel, although the hostage should have been recaptured on board the privateer; but if the bill of exchange has not been negotiated for value received at the time of his recapture, the owners of the ransomed vessel are absolved from their obligation under the bill of exchange, as well as under the ransom bill itself[66].

Hostages.

§ 182. When a captor releases an enemy's vessel on Ransom, it is allowable for him to take one or more hostages from the ransomed vessel. The French Ordonnance de la Marine[67] enjoined all captors, if they released a vessel and her cargo *par composition*, to seize all her papers, and to bring away at least two of the principal officers of the captured vessel[68]. In practice however one hostage only is taken, who is liable to be detained as a prisoner of war until the ransom is paid. The validity of the ransom bill does not in any way depend upon the taking of a hostage, but the hostage serves as a security to facilitate the recovery of the ransom in a court of law; for the hostage has a right of action in the courts of his own country against the master, and against the owner of the ship and cargo, to compel them to

[65] Corner *v.* Blackburne, 2 Douglas, p. 640.

[66] Emérigon, c. 12. Tit. XXII.

[67] The practice of ransom is recognised by this Ordinance in Tit. VI. Des Assurances, § 66. and Tit. VII. Des Avaries, § 6.

[68] Valin, Ordonnance de la Marine, Tit. IX. § 19. Lebeau, Nouveau Code des Prises, Tom. I. p. 89. Azuni, Droit Maritime, Tom. II. c. 4. Art. VI.

perform the conditions of the contract under which their property has been restored to them, and the due performance of which is a necessary condition for the recovery of his freedom[69]. But the hostage is merely a collateral security, like bills of exchange, and the escape or death of the hostage does not discharge the ransom bill[70]. The master of a ship cannot bind the owners of the ship and cargo to pay a ransom which exceeds their value[71], as they may always discharge their liability under a ransom bill by abandoning the vessel and cargo to the holders of the bill, just as the owners of a ship and cargo may abandon the ship and cargo in the Instance Court of Admiralty to the holders of a bottomry bond; when the vessel and cargo are insufficient to defray the ransom bill, the master is liable to be personally sued for the payment of the balance of the ransom bill, and for the expenses of the hostage. The loss of the ransomed ship by stress of weather does not discharge the ransom bill or release the hostage. But if the ship and cargo have been abandoned by the owners and sold under a decree of the Admiralty Court, and the proceeds should be insufficient to discharge the ransom bill, and the master should be insolvent, the captor in such a case is bound to release the hostage on payment of the sum for which the vessel and cargo have been sold by the decree of the Court; in other words, the Court of Admiralty will not suffer the money to be paid out of the Registry until the hostage is released[72].

Modern restraints upon ransom.

§ 183. The practice of releasing captured vessels on ransom being considered to be less beneficial to

69 The Hoop, 1 Ch. Rob. p. 201.

70 Azuni, Droit Maritime, Tom. II. c. 4. Art. VI. § 5.

71 The Gratitudine, 3 Ch. Rob. p. 258.

72 Yates *v.* Hall, 1 Term Reports, p. 80.

the belligerent State, to which the captor belongs, than their detention and conveyance as prize into port, and the power of ransoming vessels being liable to be abused by the captors to the great inconvenience of neutral trade, it has been the policy of the European Powers to restrain the liberty of the captors to ransom their captures. Thus France, by the Ordinance of 15 May 1756[73], forbade any cruiser to ransom any enemy's vessel on any pretext whatever, until she had sent three prizes into port; and by a later Ordinance of 30 August 1782[74] prohibited altogether the ransoming of any enemy's vessel or cargo, or the taking of any hostage, or of any written security whatever, which may be suspected to be a disguised form of ransom. The present law of France on the subject of ransom is contained in the Arrêté of 2 Prairial of the year XI[75], according to which every privateer is bound to send its prizes as soon as possible into the port from which it has been fitted out, unless prevented by stress of weather or the superior force of the enemy; but the commander of a privateer is at liberty to ransom an enemy's vessel, if he is formally authorised by the owners of the privateer under a declaration made by them before the officers of the port from which the privateer is fitted out; but no privateer is permitted under any circumstances to ransom a vessel which has a neutral passport, under very severe penalties against the captain of the privateer. In Great Britain the Parliament has been accustomed on each occasion of passing a Prize Act since 22 Geo. III. c. 25, (A. D. 1782,) to discountenance altogether the practice of ransoming ships and cargoes belonging to

73 Lebeau, Nouveau Code des Prises, Tom. I. p. 547.

74 Ibid. Tom. II. p. 427.

75 Pistoye et Duverdy, Traité des Prises Maritimes, Tom. I. p. 281.

British subjects, which may have been captured by the enemy, as well as the practice of British captors restoring or discharging any captured ship or cargo of the enemy upon an agreement for ransom[76]. With this object all ransom bills given by British subjects are declared to be null and void; and accordingly no action could be brought upon any such ransom bill in a British Court, whilst the parties who may have given any such ransom bill are liable to be proceeded against in the High Court of Admiralty for heavy penalties, "unless it shall appear to the Judge of the said Court that the circumstances of the case were such as to justify the said ransoming, or contract, or agreement for the same." On the other hand, any Commander of a British cruiser who shall have "actually quitted, set at liberty, restored, or discharged," any ship or cargo, after the same shall have been taken as prize, upon any agreement for the ransoming thereof, "shall for every such offence be liable to be articled in the High Court of Admiralty of England, at the suit of her Majesty in her office of Admiralty, and upon conviction thereof shall forfeit and suffer such penalty or fine as the said Court shall adjudge, unless it shall appear to such Court that the circumstances of the case were such as to have justified the same." The most recent of the prize Acts would thus appear to be perfectly consistent with that view of the Law, which Lord Stowell adopted under the Prize Act which was in force in 1803, when he said, "Ransoms, under circumstances of necessity, are still allowed[77], but the burden of proof of any such existing necessity is

[76] The Act for manning the Navy in the last war against Russia, 17 Vict. c. 18. contains the usual prohibitory enactments against ransom under any form.

[77] Ships taken at Genoa, 4 Ch. Rob. p. 403.

imposed by the Statute on the captors." In the United States Ransoms have never been prohibited by Congress, either in reference to enemy's property or in reference to neutral property. Chancellor Kent, in commenting upon the English view of the Contract of Ransom as having a tendency to relax the energy of belligerents and to deprive cruisers of the chance of recapture, maintains that the practice of Ransom is in many views highly reasonable and humane. Other Nations regard them as binding, and to be classed amongst the few legitimate *commercia belli*[78].

§ 184. Joint captures are said to be made when, besides the parties who are actually engaged in the capture, other parties contribute to the surrender of vessels by constructive assistance. When two or more ships actually take part in a capture, it is usual to speak of them as the actual captors, although the enemy strikes his flag in fact to one of them; but it may happen that the approach of a vessel which has never been able to take part in the contest, has intimidated the enemy and induced him to surrender. Such a vessel cannot be said to be an actual captor, and yet she may have materially influenced the capture by encouraging the efforts of the one party and discouraging the resistance of the other party, at the same time that she may have been using her best endeavours to arrive in time to give actual assistance to her friend[79]. Policy and Equity under such circumstances, concur in pronouncing her endeavours to take part in the contest to have been of assistance to the actual captors, and in regarding her in the light of a constructive captor. Joint

Joint Captures.

[78] Kent's Commentaries, I. p. 104. Azuni, Droit Maritime, Tom. II. c. 4. Art. vi.

[79] La Flore, 5 Ch. Rob. p. 268. The Virginia, 5 Ch. Rob. p. 126.

captors may accordingly comprise parties who have not taken any actual part in a capture beyond that of having actually set themselves in motion, and arrived within sight of the prize at any time before it has surrendered[80]. It is necessary however, in order to establish a claim of joint capture, to prove that the vessel claiming to be a joint captor was seen by the prize as well as by the actual captor, and thereby caused discouragement to the enemy, whilst she gave encouragement to the actual captor; but it is not necessary to prove that she was seen by the prize at the moment of surrender, if she had been seen by the prize beforehand, and might have been seen at the time of surrender, if the weather had been clear, or the darkness had not intervened[81]. The law is in one respect more favourable to public ships of war than to private ships of war. The *animus capiendi* is always presumed in favour of the former, if they should be in sight[82], as public ships are under a constant obligation to attack the enemy whenever they may meet with them, whereas private ships of war are not bound to put their Commissions in force upon every discovery of an enemy. In the case therefore of a privateer which claims to be regarded as a constructive joint captor, positive proof must be given that her commander really intended to take part in the contest; either by showing that she was actually engaged in the chase[83], or, if she had been engaged in the contest and been beaten off, that she was still in sight of the enemy and was intending to resume the contest[84]. But a public ship

[80] The Galen, 2 Dodson, p. 19.

[81] The Union, 1 Dodson, p. 746. The Financier, ibid. p. 61. The Fadrelandet, 5 Ch. Rob. p. 124.

[82] La Flore, 5 Ch. Rob. p. 268.

[83] L'Amitié, 6 Ch. Rob. p. 267.

[84] La Virginie, 5 Ch. Rob. p. 124. The Santa Brigada, 3 Ch. Rob. p. 52.

of war is entitled to the character of a constructive joint captor, where the actual captor is a privateer, under the same conditions, as if they were both public vessels of war[85]. On the other hand a public vessel which is not under orders to make captures, although its commander may have a Commission of War, enjoys no privilege in respect of a presumed *animus capiendi* over a private vessel which has a Commission of War. Thus a revenue cutter, of which the commander is authorised but not commanded by his Commission to make captures, was held by Lord Stowell to be in a condition analogous to that of a private vessel of war. Such vessels are not bound to attack and pursue the enemy more than other private vessels of war; and as all which they derive from their Commission is an authority to attack the enemy, they are thereby only put on a footing with private ships of war[86]. On the other hand, transport ships, although they may sail under pennants and are associated with fleets of vessels of war, will not be entitled to the character of constructive joint captors, if they are associated with them solely in their mercantile character; for if they have no Commission of War, they cannot be allowed to establish a claim of mere constructive assistance[87], even if their appearance should have caused actual intimidation to the enemy. Lord Stowell held, that the fact of terror, however strongly proved, would not establish that cooperation, nor that active assistance, which the law requires to entitle noncommissioned vessels to be considered as joint captors. With respect to captures made by boats, it is a general rule that the crews of the ships to which they belong are entitled to share as joint captors with the crews

[85] The Dree Gebroeders, 5 Ch. Rob. p. 339.

[86] The Bellona, Edwards, p. 65. La Flore, 5 Ch. Rob. p. 270.

[87] The Cape of Good Hope, 2 Ch. Rob. p. 282.

of their respective boats, unless the capturing boats have been detached for a time from their proper ships, and are attached to some other ship; but the claim of constructive joint capture by boats founded on the mere facts of such boats being in sight at the time of capture, has been rejected by Lord Stowell[88]. "I am not in possession," he says, "of any case in which a boat, without any actual assistance or previous concert, has been held, from being in sight only, to be entitled to share as a joint captor, even to the extent of the persons composing the boat's crew, much less to establish a claim of joint capture for the whole ship to which the boat belongs."

Distribution of Prize amongst joint captors.

§ 185. The distribution of prize amongst Joint Captors, in the absence of any positive Statute or Ordinance of the State to which they belong, is made upon general principles according to a scale proportionate to their respective force; for in that proportion they may reasonably be supposed to have contributed their aid in overpowering the enemy, if they have actually taken part in the contest, or to have caused an intimidation by their approach, which had led to his surrender, before they have been able to take part in the contest. Bynkershoek, who is averse altogether to the doctrine of *constructive* joint capture, advocates in the case of *actual* joint captors a distribution according to their respective force, from the difficulty of measuring by any more accurate test the degree in which each has assisted to overcome the enemy. Such a rule is generally adopted in the present day, in cases where the fleets of two or more allied Powers have acted in conjunction. But in the application of the rule different results will be arrived at, according as the respective force of the captors is

[88] The Odin, 4 Ch. Rob. p. 327.

calculated in proportion to the number of guns, or the number of men, or the number of guns and men combined. The British Prize Acts direct the whole proceeds to be divided amongst all the officers and crews of the respective vessels adjudged to be joint captors according to a scale fixed by Royal proclamation, under which all the officers and men of equal rank take an equal share; and the Royal Proclamation[89] of 1854 declares that ships or vessels being in sight of the prize as also of the captors, under circumstances to cause intimidation to the enemy and encouragement to the captors, shall be alone entitled to share as joint captors. The Prize Act[90] further directs the Court of Admiralty, in all cases where her Majesty's ships have acted in conjunction with the ships of a Power in alliance with her Majesty, to apportion to such Ally a share of the proceeds of such prize, according to the number of officers and men present and employed on the part of such Ally as compared with the number of officers and men employed on the part of her Majesty in taking such prize, and without reference to their respective rank. France, by a Decree bearing date 23 May 1854, has adopted a like rule of division[91]. There had been a previous Convention on the subject of prize between France and Great Britain, and each State had directed its Prize Courts by a municipal enactment to observe such a rule of distribution in every case of capture, in which the ships of an Ally were concerned, as would give effect to that Convention. Neither State undertook to distribute the share of its Ally, but the Courts of Prize were directed to transmit the share, apportioned to the Ally, to such persons as should

[89] Royal Proclamation of 29 March 1854.

[90] 17 Vict. c. 18. (2 June 1854.)

[91] Pistoye et Duverdy, Tom. II. p. 447.

be duly authorised on behalf of the Ally to receive the same, and whose duty it would be to superintend the distribution of that share amongst the parties entitled to it according to its own laws and regulations. In the United States of America the standard of distribution amongst public ships in cases of joint capture appears to be the combined number of men and guns on board of each ship in sight[92]; but as regards private armed ships no regulation has been adopted, and the distribution is governed by the general rule of prize distribution, namely, in proportion to the number of men composing their respective crews. Such also was the rule of the English Prize Courts in regard to privateers, as settled by solemn adjudications at the Cockpit and in the King's Bench[93]. Mr. Justice Story observes, that "this rule has the advantage of great practical simplicity and general equity. It seems bottomed on the soundest sense, and places the relative force in the power and activity of animated beings, in which it must always ultimately reside, rather than in the mere instruments, which without such power would be useless and unavailing[94].

Condemnation of Prizes brought into the port of an ally.

§ 186. The apportionment of a share of the proceeds of prize to an Ally is within the competency of the Prize Courts of a belligerent Power, for a belligerent Power and its Ally form one State for the purpose of a common war, *unam constituunt civitatem*[95]. In a similar sense the ports of an Ally are equivalent to the ports of the co-belligerent State, to which the capturing vessel belongs, for the purpose of founding the

92 Act of 23 April 1800. (5 vol. U. S. Laws, p. 108.)

93 Roberts and Hartley, 3 Douglas, p. 311. Duckworth *v.* Tucker, 2 Taunton, p. 7.

94 The brig Despatch and her cargo, 2 Gallison, p. 2.

95 The Henrick and Maria, 4 Ch. Rob. p. 60.

jurisdiction of the Courts of the Captor over the prize. Claims of Prize were originally prosecuted before the Admiral of the Fleet[96] to which the capturing vessel belonged, or his Lieutenant[97]; and although by the Municipal Law of some countries[98] other authorities besides the Admiral or his Deputy-General might hold cognisance of maritime captures, the Admiral or his Vicegerent was the competent judge upon questions of Prize, as between Nations[99]. There was no necessity at any time, as between Nations, for the Captor to bring his prize within the ports of his own State to found the jurisdiction of the Admiral over it: if it was brought *infra præsidia*, so as to secure it from recapture by the enemy, it was sufficient, and this condition is evidently satisfied by the Captor carrying his prize into the port of an Ally. A sentence of condemnation is accordingly held to be valid, if it be passed by a Court of Admiralty sitting in the country of the Captor against a ship and cargo, which have been brought by the Captor into the port of an Ally[100]. The proper and regular Court for the Trial of Prize is the Court of the State to which the Captor belongs; but where the capture is made by the joint forces of two countries, it is usual for the co-belligerent Powers to agree that the adjudication of all questions of Prize shall belong to the jurisdic-

96 Rymer, Fœdera, Tom. IV. p. 14, anno 1357.

97 Ordinance of Charles VI of France, anno 1400. Lebeau, Nouveau Code des Prises. Tom. I. p. 1.

98 Ordinance of Henry VI of England, anno 1496. Rymer, Fœdera, Tom. X. p. 168.

99 Treaty of Peace and Commerce between Henry VII of England and Charles VIII of France, 24 May 1497. This treaty is well worthy of notice as containing many regulations for the Prize proceedings of the fifteenth century, which correspond with the practice of the present times. Robinson's Collectanea Maritima, p. 83.

100 The Christopher, 2 Ch. Rob. p. 209.

tion of the country, of which the flag shall have been borne by the officer having the superior command in the action[1]. It is not usual for a belligerent Power to set up a Court of Admiralty within the territory of an Ally, although under treaty the Ally might have granted authority for such a purpose, and as co-belligerent Powers in the operations of war form one State, no principle of the Law of Nations would be violated thereby. On the other hand, it would be a violation of Neutrality for a State, which is not a co-belligerent, to allow a belligerent Power to set up a tribunal of Prize within its territory, and to allow it to condemn to the use of the captors the property of the subjects of Powers, with which it is at amity. Lord Stowell accordingly refused to recognise a sentence of condemnation passed by a French Consular Court set up within the port of Bergen in Norway upon a British vessel, which had been brought in as prize into that port by a French cruiser, Norway being at such time a Neutral Power, on the ground of "the act of the French Consul being a licentious attempt to exercise the Right of War within the bosom of a neutral country, where no such exercise has ever been authorised[2]."

Treaty between Denmark and Genoa.

Mr. Manning in his Commentaries on the Law of Nations[3] has referred to a Treaty concluded on 30 July 1789 between Denmark and Genoa, as being an exception to the rule, which Lord Stowell on this occasion asserted to be universally received, in matters of Prize, namely, that the tribunals of the Law of Nations in those matters should exercise their jurisdiction within the belligerent country; but it may

[1] Convention between France and Great Britain 10 May 1854. Martens, N. R. Gén. Tom. XV. p. 581.

[2] The Fladoyen, 1 Ch. Rob. p. 146.

[3] P. 381.

be a question whether the provisions of that Treaty are to be interpreted in such a sense as will warrant their being regarded as exceptional to the general rule in such matters. The provisions of Art. XIII are as follows :—"Si une des deux Parties contractantes vient à avoir la guerre avec une puissance tierce, l'autre partie contractante, qui est restée neutre, sera la maitresse, en vertu de l'Article IV, d'admettre ou de refuser dans ses ports, de juger dans ses Tribunaux d'Amirauté ou de n'y pas juger des prises, qui se feraient respectivement par les puissances belligérantes[4]." In construing this article of the Treaty regard must be paid to the provisions of Article IV, which stipulate that either party shall enjoy all the rights of neutrality, in case the other should be involved in war, on condition of its observing all the duties of neutrality. It is evident that Article XIII must be interpreted in conformity with Article IV, the object of which was not to enlarge the rights of a belligerent party, but to secure the recognition on its part of the rights of the neutral party. But amongst the rights of a Neutral Power are those of admitting or refusing to admit the vessels of Belligerent Powers to enter its ports, and likewise of admitting or refusing to admit captures to be made within its jurisdiction and in violation of its territory. The stipulations of Art. XIII of the Treaty refer expressly to a jurisdiction to be exercised by the Courts of Admiralty of a Neutral Power in virtue of Art. IV, the object of which is to secure to the Neutral Power the recognition of its full rights of neutrality; and such a result would be furthered by securing to its Courts of Admiralty the right to hold cognisance of all questions of Prize involving

[4] Martens, Récueil, Tom. IV. p. 449.

any violation of those rights. Proceedings in such matters, if originated in a Court of Admiralty of a Neutral Power, might have been *primâ facie* open to objection on the part of a Belligerent Power in the absence of Treaty-stipulations, as the ordinary practice in modern times, in cases where a belligerent vessel has made capture of an enemy's vessel in violation of the territory of a Neutral Power, has been for the Neutral Power to prefer a complaint to the Government of the Belligerent Power, and when the capture is in controversy in a Belligerent Court of Prize, to claim the release of the vessel on the ground of the capture having been made in violation of its territory. But it is perfectly consistent with all due respect to the Rights of a Belligerent, as such, that the Courts of a Neutral Power should take cognisance of captures, which involve a violation of its Sovereignty, if the Captor and his prize should be found within its jurisdiction; and it seems reasonable to construe Article XIII of the Treaty as intended to provide against any dispute on the subject of the exercise of this Right, rather than to accept the interpretation suggested by Mr. Manning, that it was intended to concede to the Belligerent a privilege of holding a Belligerent Court of Prize within Neutral territory.

CHAPTER X.

ON PRIVATEERS.

Privateers distinguishable from Letters of Marque—Gradual Restraint of Private Expeditions on the Sea—Privateers in the sixteenth and seventeenth centuries—A Commission of war must be on board a Privateer—What constitutes a lawful Commission of war—A Privateer may not have two Commissions of war from different Powers—Belligerent Powers may grant Commissions of war to Aliens—British Practice in issuing Commissions to the Commanders of private ships—Restraints upon Privateers—Purport of Instructions issued to British Privateers—Distinguishing Flag of British Privateers—The Flag of Foreign Privateers—Verification of the Military Flag of a Privateer—A Neutral merchant vessel cannot claim to verify a Privateer's belligerent character—The exercise of the Belligerent Right of Visit and Search regulated by Treaties—Privateers not admitted to the same Comity as Public ships of war—Restrictions upon Privateers in neutral waters—Treaty-Restraints upon neutral Subjects accepting Letters of Marque from Belligerent Powers—Municipal prohibitions against Subjects accepting Commissions of war from Foreign Powers—Privateers under special conventions piratical vessels—Distinction between piracy under special conventions and piracy under the Common Law—Conventions amongst States against the Employment of Privateers—Declaration of the Congress of Paris of 1856.

§ 187. PRIVATEERS are armed ships which are fitted out by private persons, and sail under a commander, to whom a Belligerent Power has granted a commission to seize and take the ships and goods of the subjects of an Enemy Power. The term is of English

Privateers are distinguishable from Letters of Marque.

origin[1], and appears to have been employed to designate a particular class of private armed vessels in the reign of King Charles II; but it is applied in the present day indiscriminately to private ships which sail under Commissions of War, and to private ships sailing under Letters of Marque and Reprisals. The former class of vessels however is essentially distinguishable from the latter class, inasmuch as a Letter of Marque and Reprisals may be granted to the commander of a private ship in time of peace, and only empowers the bearer of it to make Reprisals against the ships and goods of the subjects of a Power, which has refused to make reparation for an injury done by one of its subjects; whereas a Commission of War empowers the person, to whom it is granted, not merely to seize and take the ships and goods belonging to the subjects of the Power, against which War has been declared or otherwise commenced, but such other ships and goods as shall be liable to confiscation pursuant to Treaties and the Law of Nations. The form however and the extent under which Commissions of War may be issued to the commanders of private ships, rests with the discretion of each Belligerent Power, subject however to the same limitations, whatever those may be, which the Law of Nations has attached to Commissions of War issued to public ships[2].

[1] The Dutch name for them is Kapers or Commissie-vaarders. Cf. Bynkershoek, Obs. Jur. Publ. L. I. c. 118. De Prædatoria privata.

[2] The word Privateer, as far as the author is aware, occurs for the first time in a letter of Sir Leoline Jenkins of 5 Dec. 1665. (Life of Sir Leoline Jenkins, II. p. 727.) Lord Clarendon in his Life (II. p. 335), in narrating the events of the same year, 1665, says, "It was resolved that all possible encouragement should be given to privateers, that is, as many as would take commissions from the Admiral to set out vessels of war, as they call them, to take prizes from the enemy.

§ 188. It would appear to have been the custom of Sovereign Princes in the fourteenth century, if we may draw any general inference from the practice of the Kings of Aragon, to rely upon the voluntary efforts of their Subjects, whenever there was occasion to resent any injury done to them on the High Seas, and to grant in such cases Letters Patent to the Commander of an armed Fleet (*Armada*), the ships or vessels of which were fitted out at the expense of private persons[3]. Under the authority of such Letters Patent the Captain or Commander-in-chief of the Armada exercised over all the ships and vessels which took part in the expedition a jurisdiction *secundum statum et consuetudinem Armatæ*. The Ordinances *sur les armemens en course*[4], which are sometimes printed in continuation of the chapters of the Consolato del Mare, as if they formed a portion of those ancient Customs of the Sea, contain regulations for the government of private armed ships going on a cruise, from which it would appear that the Commander-in-chief of the expedition was styled Admiral, and exercised a jurisdiction according to an established usage, *d'après les usages de la Course*. The contents of these Ordinances, the compilation of which is assigned with great probability to the early part of the fourteenth century, as the use of artillery was evidently not known when they were drawn up, show that the Commanders of private cruisers did not at such time require any express License or Commission from a Belligerent Power[5],

Gradual Restraint of Private Expeditions on the Sea.

3 Privilège pour les armateurs en course de 1330. Pardessus, Lois Maritimes, V. p. 393.

4 Capmany regarded these chapters as an addition to the Consolato del Mare, and M. Pardessus has published them in a separate form. Tom. V. p. 396.

5 The commission, granted by King Henry VIII (A. D. 1512) to Sir Edward Howard, as Admiral of the Sea, in the expedition against the French King in Guienne, authorising him to com-

nor were they under any obligation to submit their captures to a judicial enquiry in any Court of a Belligerent Power, before they could dispose of them. But with the commencement of the fifteenth century greater order and regularity were introduced into the conduct of Maritime warfare. It had been already stipulated in various treaties of the fourteenth century, that the subjects of the contracting Powers should not have recourse to measures of force, until they had applied in vain to "the Conservators of the Peace," and that the Sovereign Power should not grant Letters of Marque and Reprisals to their subjects, until such application had been made, and made in vain. We find accordingly that Municipal Laws were enacted in various States in the course of the fifteenth century, the object of which was to restrain individuals from committing any violence upon the Main Sea, without having previously obtained authority to that effect from their Sovereign, and to oblige them to bring all their captures into port for adjudication before an Admiralty Tribunal. One of the earliest of such Municipal Laws is the Ordinance[6] of Charles VI of France (A. D. 1400), the third article of which provided, that "if any one, of whatever estate he may be, shall set forth any ship at his own expense to make war against our enemies, it shall be by the permission and consent of our Admiral or his Lieutenant, who has or shall have in right of his said office, the cognisance, corrections, and punishment of all acts done upon the said sea and its dependencies, criminally and civilly;" and further, that "in case our Admiral or

mand all the captains, masters of ships, and others taking part in the expedition, will be found in Rymer's Fœdera, Tom. XIII. p. 229.

[6] Lebeau, Nouveau Code des Prises, p. 1.

one of his lieutenants shall not accompany the expedition to maintain order amongst the parties to it, every Commander of a ship shall swear to bring all his prizes into port and give an account of them to our said Admiral." With a similar object the Statute of Truces was passed in England in 1414[7], under which the Commander of every vessel putting out to sea was bound to swear before the Conservator of the King's Peace and Safe Conducts, that he would not attempt to do anything against the King's Truce and Safe Conducts, and that if he took anything upon the sea from the King's enemies or any others, that he would bring such things into the port from which the vessel had sailed, and thereof make full information before the said Conservator, who had power and authority under the Letters Patent of the Crown, and also by Commission of the Admiral of England, to enquire and decide upon all offences against the King's Truce and Safe Conducts upon the Main Sea, as the Admirals of the Kings of England before this time reasonably after the old Custom and Law on the Main Sea have done or used[8]. This Statute however being found to operate prejudicially in discouraging the King's Subjects from attacking the King's Enemies, provision was made by a subsequent Statute, 4 Henry V. c. 7, (A.D. 1416,) for enabling the King's Subjects who had been injured by the Subjects of any other Power, upon demand to obtain Letters of Request under the Sign Manual of the Sovereign addressed to that Power, requiring satisfaction to be made according to the rules of justice, and upon failure of such Letters of Request, to obtain Letters of Marque

[7] 2 Henry V. c. 6. De Lovio *v.* Boit, 2 Gallison, p. 430.

[8] By this Statute it was made High Treason for a Subject to violate the King's Truce or Safe Conducts.

and Reprisals under the Great Seal against the Subjects of that Power[9]. An Ordinance for a similar purpose was issued in 1487 by Maximilian of Austria, after his marriage with Mary of Burgundy, by which it was provided that no person should fit out a ship of war from any port in the Low Countries without the leave and express license of our Admiral or his Lieutenant; and that the Commander of the ship shall swear not to plunder our subjects or the subjects of our friends or allies, but only to make war upon our enemies[10]. It may be inferred from the provisions of two Treaties of the fifteenth century, namely, a Treaty[11] concluded in 1495 between Henry VII of England and the Duke of Burgundy, (Art. 17.) and a Treaty[12] concluded in 1497 between Henry VII of England and Charles VIII of France, (Art. 7.) that the practice was at that time being introduced of taking sureties (*idoneam cautionem*) from the masters or owners of all ships going out to sea, that they would keep the peace towards the Subjects of friendly Powers, and bring all prizes, which they might make, into port for adjudication[13].

§ 189. The origin of Letters of Marque and Reprisals has been discussed in an earlier chapter. The

9 A Proclamation was made by King Henry VI in 1426 forbidding English captors to proceed to sale of Prize Goods anywhere but in England, and not before condemnation by the King's Council, the Chancellor, or the Admiral. Rymer, Fœd. Tom. X. p. 368.

10 Récueil, Van Zeezaken, c. 3. pp. 1–22.

11 Schmauss, Corpus Jur. Gent. Academicum, p. 142.

12 This Treaty, which is in Robinson's Collectanea Maritima, p. 83, deserves perusal, as its object was to regulate the proceedings in Courts of Prize; and its regulations are for the most part observed by such Courts in the present day. See Tractatus Deprædationis, concluded between Henry VIII of England and Francis I of France in 1526. Rymer, Tom. XIV. p. 147.

13 Martens in his Essay on Privateers, § 15, says that he does not find any instance of such sureties being given earlier than 1584 in France, and 1597 in the Low Countries.

introduction of Commissions of War granted to the commanders of private ships, as distinguished from Letters of Marque and Reprisals, may with probability be referred to the Kings of France. It seems to have been the rule of the French Monarchs during the fifteenth and sixteenth centuries to rely altogether upon the zeal and exertions of private citizens, whenever it might be necessary to make War by sea. Thus in 1555, when Margaret of Parma, as Regent of the Low Countries, embargoed all the French vessels which were in the ports of the Low Countries, King Henry II of France applied to the merchants of Dieppe, who fitted out at once a fleet of nineteen ships, and gave battle successfully to the Spanish fleet[14]. That Commissions of War were accustomed at this time to be issued by Sovereign Princes to private ships fitted out either by their own Subjects, or by the Subjects of other Powers, may be inferred from a Treaty concluded between the Emperor Charles V of Spain and Mary Queen of Scotland in 1550, in which a clear distinction is made between Letters of Reprisals and Commissions of War: "Revocando quascunque commissiones ac literas patentes tam Repræsaliarum, quam alias quascunque *super facultate belligerandi*, et subditis alterius principis nocendi, sive incolis sive exteris datas et concessas[15]."

Privateers in the sixteenth and seventeenth centuries.

The long period of Maritime warfare which ensued upon the revolt of the Low Countries against the dominion of Philip II, as it gave an extraordinary

[14] Pistoye et Duverdy, Traité des Prises Maritimes, I. p. 23.

[15] Schmauss, Tom. I. p. 285. This distinction is still more clearly recognised in a Treaty of Alliance concluded between Philip III of Spain and James I of England, in 1604, in which these words occur, "Quascunque Commissiones et literas tam Repræsalium seu de Marcha, quam facultatem belligerandi continentes." Schmauss, Corp. Jur. Acad. I. p. 437.

impulse to the fitting out of private vessels of war, so it furnished occasion for determining more carefully the rights and obligations of the Commanders of such vessels by Municipal regulations, under which sureties were universally required to be given to the Admiral for the good conduct of the Commanders and crews of such vessels, and a course of judicial proceedings was established for determining the legality of the captures made by them. The Edict concerning the jurisdiction of the Admiralty issued by King Henry III in 1584, contained various provisions on the subject of private ships of war, with the view of restraining the excesses of their Commanders and crews[16]. The instructions for the Colleges of Admiralty in the Low Countries followed in 1597[17]. The Proclamation made by Queen Elizabeth of England in 1602[18], and the Spanish Ordinance for the navigation of Cruisers issued in 1621, had equally the same object in view[19]. The Parliament of England does not appear to have legislated on the subject of Privateers before the 4th and 5th of William III. c. 25, but the Proclamation of Queen Elizabeth of 1602 had evidently in view the regulation of private ships of war, when it provided that no man-of-war should be furnished or set out to sea without license[20] under the Great

[16] Lebeau, Nouveau Code des Prises, p. 19.

[17] Instructie voor de Collegien ter Admiraliteyt, 15 Aug. 1597. Récueil Van Placaarten, D. I. pp. 1–26.

[18] Proclamatio Regia ad reprimendas Deprædationes super mare. Rymer, Tom. XVI. p. 436. Robinson's Collect. Marit. p. 21.

[19] Ordenanza para Navigar in Corso, 24 Dec. 1621. D'Abreu Colecion de los Tratados. Phil. IV. Tom. I. p. 555.

[20] In the articles on the subject of prize which came under the consideration of the Royal Commissioners in 1601, it is provided that ships under the immediate commission of the Sovereign were to be regarded as Royal ships. Such ships are evidently distinguished from those contemplated in the Pro-

Seal of the Admiralty of England upon sufficient bonds with sureties first given to the Judge of the High Court of the Admiralty or to his Deputy, for the good behaviour of themselves and company towards her Majesty's Friends and Allies. And further, that no prizes taken shall be disposed of till adjudication given by the said Judge, and order given by him for the disposing thereof, under pain of confiscation of ship and goods. The Act-books of the High Court of Admiralty of England in matters of Prize do not throw any light on this period, as they do not extend further back than 1643[21], and there are no sentences preserved of more ancient date than 1648[22]. The period of the Commonwealth next following is also a blank in the history of the Law of the English Prize Courts; but on the breaking out of the first Dutch war (A. D. 1664) in the reign of Charles II, the King created a new kind of Commission consisting of the Lords of the Privy Council, for the hearing and determining of all matters and questions that might happen to arise concerning Prizes and Captures.

The following Order in Council[23] was issued on this occasion at the Court of Whitehall, Feb. 4, 1664:

clamation of 1602 as having a license under the Great Seal of the Admiralty. *Private Ships of war* are recognised in terms by 22 and 23 Car. II. c. 11. § 11.

[21] It appears from Rymer's Fœdera, Tom. XVIII. p. 731, that King Charles I issued a Commission to Lord Carleton, Sir John Coke, Sir Julius Cæsar, and others, in 1626, to make enquiry and to settle a system of prize proceedings agreeably to the law in such cases, and what is therein practised by other nations. The result of this enquiry does not appear to be on record. Robinson's Collectanea Maritima, p. 69.

[22] Lindo *v.* Rodney. Douglas Reports, p. 616.

[23] This order is copied from a MS. book in possession of the author, which purports to be copied from a book belonging to Sir Nathaniel Lloyd, her Majesty's Advocate General in 1710, containing copies of papers belonging to his father, Sir Richard Lloyd, Advocate General of the

By the Right Hon. his Majesty's Principal Commissioners for Prizes.

Whereas we are informed that upon trial and adjudication in the Court of Admiralty of several ships taken as prizes, you proceed to the condemnation of the bottoms as Dutch, and respite your Sentence as to the Goods with offer of time and liberty unto all claimants, who are likely to withdraw, by their pretended proofs, great quantities of the cargo of ships condemned.

We therefore in pursuance of his Majesty's command, and to prevent that the seizure of all enemy's ships may not by such liberty of claiming the goods become wholly ineffectual, and his Majesty having further declared himself that he will speedily send you Rules for your better direction therein, do hereby pray and require you to respite all proceedings of that nature until you receive further orders.

ALBEMARLE. ST. ALBANS. LAUDERDALE.
JNO. BERKELEY. HEN. BENNETT.
WM. MORRIS. ROBT. SOUTHWELL.

The Lords Commissioners thereupon appointed a body of Civilians to review the maritime Law, and to compile a body of Rules and Ordinances, by which the Judge of the Admiralty for the time being should proceed in the adjudication of Prize[24]. Sir Leoline Jenkins was one of the Civilians selected on this occasion by the Lords of the Privy Council, and a body of Rules and Regulations was prepared by him and his colleagues, which was approved by his Majesty in Council, and has been the standard of all future proceedings in the English Prize Court.

§ 190. When War exists between two independent Powers, all the Subjects of the one are the enemies

Lord High Admiral in 1674, and subsequently Judge of the Admiralty.

[24] Prize, as observed by Lord Mansfield, is not a *civil* or *marine cause*, to be heard and decided according to the Process of the Instance Court of Admiralty, but the whole system of litigation and jurisprudence in the matters of Prize is peculiar to itself. Lindo *v.* Rodney, 2 Douglas, p. 614.

of the other, and are of right entitled to do all such acts to the Subjects of the other, which War justifies between the Belligerent Powers themselves. A private ship accordingly which is the property of the Subject of a belligerent Power, and is not furnished with a Letter of Marque or Commission of War, may nevertheless lawfully attack a private ship, which is the property of an Enemy, because a state of War exists between them, and a state of War authorises the one to attack and capture the other. It may indeed happen that the Municipal Law of the Belligerent State to which the Captor belongs, has declared all captures made by private ships not having Commissions of War or Letters of Marque[25] to be Droits of the Lord Admiral, or it may have declared that captures made by non-commissioned ships shall under certain circumstances be shared amongst the crews in the same way as in the case of private ships having a Commission of War[26], but such distinctions do not arise under any Common Law amongst Nations; they are the creatures of Municipal Law, and may be varied at the pleasure of the Sovereign Power.

A Commission of War must be on board a Privateer.

The case is otherwise however with regard to a ship, which is the property of the Subjects of a Belligerent Power, if it should venture to attack another ship belonging to the Subjects of a Neutral Power. In such a case the attacking vessel, if the Commander of it be not furnished with a Commis-

[25] Under the Order of Council of 6 March 1665–6, declaring what shall be Droits of the Admiralty of England, it was declared that all enemy's ships and goods casually met at sea and seized by any vessel not commissionated, do belong to the Lord High Admiral. The "Rebeckah," 1 Ch. Rob. 227. The "Melomane," 5 Ch. Rob. p. 42.

[26] The 22 and 23 Car. II. c. 11. § 11. provided to that effect, when the private ship had been attacked and had captured its assailant.

sion of War from the Belligerent Power, may be treated as a pirate by the neutral vessel which she has attacked, or by any vessel coming to the aid of the latter; and even if the assailant should succeed in capturing the neutral vessel, the latter would be entitled to be released by a tribunal of Prize, inasmuch as the capturing vessel had not any Commission of War. Every vessel, claiming to act as a private ship of War, must have her Commission of War on board. Thus a British vessel claiming to have a Commission of War from the King of Portugal against the Castilians and Moors, captured a vessel belonging to Ostend in the British Channel, and brought her Prize into the port of Dover, where the Prize was taken possession of by the officers of the Customs. It appeared that there was only on board the Captor's vessel a transcript of a Commission from the King of Portugal, translated into French, and attested for a true translation under the hand and seal of the French Consul at Lisbon. Sir Leoline Jenkins[27], acting as judge of the Admiralty, advised the Lords of his Majesty's Council, that amongst other grounds why the capture was unduly made, and the Ostender ought to have his ship and goods restored to him, the true Commission was "neither pretended, showed, nor indeed on board, at the time of the capture[28]." On the other hand, if the Commission of War has been lost since the capture has been made, Courts of Prize have allowed the fact

[27] Life of Sir Leoline Jenkins, Vol. II. p. 727. A.D. 1665.

[28] In the case of an acknowledged Independent Power the seal of the Commission is held to prove itself; but when a Civil War is raging in a foreign country, and one part of the population separates itself from the old Government, and places itself under a new distinct Government, the seal of a Commission issued by the new Government cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits. The United States *v.* Palmer, 3 Wheaton, p. 644.

of such a Commission having been on board the Privateer at the time of the capture to be proved by oral evidence. Thus a question came before the Supreme Court of the United States, in regard to a vessel and cargo which had been captured by a Venezuelan Privateer, which had been subsequently lost before a Prize Court had adjudicated upon the capture. It was attempted by the former Spanish owner of the vessel and her cargo to obtain restitution of his property from the American Prize Court, on the alleged ground amongst others, that the Privateer had not any Commission of War on board at the time when she captured the Spanish vessel. The Court however on this occasion allowed the Prize-crew to prove by oral evidence that the capturing vessel had a Commission from the Government of Venezuela at the time the capture was made, which had been issued and delivered at Carthagena, and that the Commission was lost on board of her, as she sank almost immediately after the Prize-crew had taken possession of the Spanish vessel[29]. All Codes of Maritime Law recognise the necessity of a Commission of War being on board a Privateer. Thus the French Ordonnance de la Marine (A.D. 1681)[30] whilst it enacted that no one should fit out a vessel of war without a Commission from the Admiral, declared in its fourth article all vessels to be good Prize which should be found cruising on the sea without a Commission from some Prince or Sovereign State. The Spanish Ordinance of 1718[31] embodies in its sixth article the identical provision of the French Ordinance; and the British Naval

[29] The Estrella, 6 Wheaton, p. 304.

[30] Lebeau, Nouveau Code des Prises, Tom. I. p. 82.

[31] Tratado Juridico-Politico sobre Pressas de Mar su autor Don Felix Joseph de Abreu y Bertodano, Cadiz, p. 318.

Instructions, which were published in 1730, declared that if any ship or vessel shall be taken acting as a Ship of War or Privateer, without having a Commission duly authorising her to do so, her crew shall be considered as pirates and treated accordingly[32].

What constitutes a lawful Commission of War.

§ 191. What constitutes a lawful Commission of War has been occasionally in dispute. After the revolt of the Low Countries against the dominion of Philip II, not only Spain, but other Powers, refused to recognise the lawfulness of the Letters of Marque and Reprisals issued by the Prince of Orange in 1569, on the ground that he was not competent to grant them, not having any Admiralty jurisdiction: but after he had been nominated Admiral of the United Provinces in 1576, the Neutral European Powers recognised the legality of his Letters Patent, although Spain continued for a considerable time to treat the *sea-beggars*, (for such were they called by way of contempt,) as pirates[33]. The question, as it regards the relations between a revolted Province and the Mother Country, may be embarrassed by considerations arising out of the Municipal Law of the Mother Country; but as regards third Powers, if there be a state of War between two Communities of men, neither of which recognise *de facto* any political Superior, vessels sailing under the flag of either Community are entitled so far to the *jura belli*, that they cannot be treated as pirates by the public ships of Neutral Powers. Thus the armed schooner Invincible, sailing under the flag of the newly-constituted Republic of Texas, captured in the month of April 1836 the American brig Pocket, carrying munitions of war to a port within the territory of Texas for the use of

[32] The same directions are given in the British Naval Instructions of 1806 and of 1826.

[33] *Les gueux de mer* was the name given to these privateers by the Spaniards.

the Mexican army, then attempting under the command of General Santa Anna to reconquer that former Province of Mexico. The United States ship of war Warren thereupon captured the Texian schooner as a pirate, and brought her to New Orleans for condemnation in that character. The Attorney General of the United States on this occasion laid it down in his Report to the President of the United States, that when "a civil War breaks out in a foreign Nation, and part of such Nation erect a distinct and separate government, and the United States, although they do not acknowledge the independence of the new government, *do yet recognise the existence of a civil war*, our Courts have uniformly regarded each party as a belligerent Nation in regard to acts done *jure belli*. Such may be unlawful when measured by the Law of Nations or by Treaty-stipulations; the individuals concerned in them may be treated as trespassers, and the Nation, to which they belong, may be held responsible by the United States; but the parties concerned are not treated as pirates. It is true, that when persons acting under a Commission from one of the belligerents make a capture ostensibly in the right of war, but really with the design of robbery, they will be held guilty of piracy. In this present case there is not the least reason to believe that the capture was made with any criminal intent. It would seem to be an infraction of the Treaty made in 1831 between the United States and the United Mexican States, (of which Texas was then a constituent part;) and there may be other reasons for doubting its legality as an act done in the Right of War; but that it was really done in that character, and no other, is very clear. The existence of a Civil War between the people of Texas and the authorities and people of the other Mexican States was recog-

nised by the President of the United States at an early day of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican Government. This recognition has been since repeated by numerous acts of the Executive, several of which had taken place before the capture of the Pocket. On the assumption that the actors were aliens, the case is therefore fairly brought within the principle above stated, and the charge of piracy cannot be sustained[34]." This opinion of the Attorney General of the United States is justly based on the assumption, that the Rights of War as between Belligerents and Neutrals are essentially Rights of Good Faith.

A Privateer may not have two Commissions of War from different Powers.

§ 192. Martens, in his Essay on Privateers, observes, that there is nothing that prevents a belligerent Power from granting Letters of Marque and General Reprisals to the subjects of an allied or even of a neutral Power; but that no person is allowed to take Commissions from two Princes, even if they be Co-belligerents[35]. In support of this view, we find that the Spanish Ordinance of 1621 declared that those vessels which have Commissions from two different Princes or States, shall be declared good Prize; and if they be armed for war, the Captain and officers shall be treated as pirates. The French Ordinance of 1681 provides in like manner, that every ship having a Commission from two different Princes or States shall be good Prize; and if it is armed for war, the Captain and officers shall be punished as pirates.

34 Letter of 17 May 1836 of the Attorney General, B. F. Butler, to the President of the United States. Opinions of the Attorneys General of the United States, Vol. II. p. 1066.

35 Bynkershoek, Obs. Jur. Publici, CXVII. Sir Leoline Jenkins's Works, Vol. II. p. 714.

If it is borne in mind, that a common object of Municipal Ordinances and International Compacts in regard to Privateers, has been to secure that the conduct of their Commanders and crews on the High Seas shall be controlled by the Admiralty Courts of the Power, under whose Commission they undertake to make prize of Neutral property, and that it is a regulation of the Municipal Law of most States, that a Privateer shall give securities to bring all its captures into the port, from which it has been fitted out; it is obvious that no adequate supervision could be maintained in the manner contemplated over Privateers, if the Commander of a Privateer were at liberty to accept a Commission from more than one Power[36]. The reasons for this prohibition are equally valid in the case of two Co-belligerent Powers. On the other hand, there is nothing to prevent the Commander of a Privateer from holding two Letters of Marque issued by one and the same Power against two different Powers: for instance, Great Britain might be at war with Spain, and might see fit to grant Letters of Marque to private ships against Spain; and upon war subsequently breaking out with France, might further see fit to grant to the Commanders of the same ships Letters of Marque against France. Such additional Letters of Marque will be perfectly lawful, for even without such Letters of Marque against France, the Commander of a British vessel will be justified under the Law of Nations in attacking and capturing French vessels, if war should have broken out between Great Britain and France, as all the subjects of the British Crown have thereupon become enemies of the subjects of the French Crown. But

[36] It is a Municipal regulation of most of the European States, that all prizes made by vessels cruising under their flag shall be brought into their ports, and *nowhere else*, for adjudication.

the Commander of a British vessel will not be justified, until he has obtained a Commission of Marque against France, in capturing Neutral vessels for carrying Contraband of War to French ports. Further, whatever Prize he may have made *jure belli* of Enemy's property, all the interest in such Prize will accrue to the Lord High Admiral, until he has obtained a Commission of Marque against France. Such was the decision of the High Court of Admiralty in the case of the Grand Terrein[37], a French ship, taken by the Tartar privateer, which had a British Commission of Marque against American property, and had petitioned the Lords of the Admiralty for a Letter of Marque against France on the day before the French ship was taken. The French ship was held in this case to be good Prize, as being Enemy's property ; but it was condemned as a Droit to the Lord High Admiral.

Belligerent Powers may grant Commissions of war to aliens.

§ 193. There is nothing in the Common Law of Nations which forbids a Belligerent Power from granting Letters of Marque or Commissions of War to aliens, even if they should be the subjects of the Enemy-Power[38]. Thus we find that the Commission which it is usual to issue under the Great Seal of Great Britain to the Lord High Admiral or the Commissioners for executing the office of Lord High Admiral[39], empowers them " to issue forth and grant Letters of Marque or General Reprisals to any of our loving subjects, *or others*, whom he or they may deem fitly qualified in that behalf, for taking the ships, vessels, and goods, belonging to the enemy or to any persons being subjects of the enemy, or inhabiting

37 1 Hay and Marriott, p. 155.

38 The Mary and Susan, 1 Wheaton, p. 46.

39 Such is the form of the Commission which was in use in the reign of George II. Beauwes, Lex Mercatoria, Tom. II. p. 341; and also in the reign of George III. Marriott's Formulary, p. 104.

within any of his territories." The Swedish Ordinance of 19 Feb. 1715[40] recites in terms that Commissions are to be granted not only to Swedes, but to the Subjects of foreign Powers: "Le Roi voulant bien permettre, non seulement à ses propres sujets, mais aussi *à ceux des Puissances Etrangères*, d'aller en course sur tous ceux qui contreviendront à ce Règlement, un chacun qui souhaitera d'avoir une Commission d'Armateur, l'obtiendra de Sa Majesté ou de ses Amiraux: mais ceux qui ne seront pas munis d'une telle commission, n'auront point la permission d'aller en course."

British practice in issuing Commissions to the Commanders of private ships.

§ 194. The practice in regard to the issuing of such Commissions was for a party who might be desirous to obtain Letters of Marque or General Reprisals for a vessel of which he was owner or part owner, to petition the Lord High Admiral, or the Commissioners for executing his office, to grant a Commission to the Commander of the vessel specified by name; and for the Lord High Admiral or the Commissioners for executing his office, if they were satisfied of the sufficiency of the vessel and her crew, thereupon to issue a Warrant to the Judge of the High Court of Admiralty, directing that a Letter of Marque and Reprisals should be issued to the Commander, named in the Petition, out of the High Court of Admiralty[41]. It was usual for the Crown, at the same time that it issued its Commission under the Great Seal, to issue Instructions under the Royal Signet and Sign

[40] Mémoires de Lamberty, Tom. IX. p. 226.

[41] It was provided by 43 Geo. III. c. 96, that the owners of all privateers should nominate and register a Proctor in the Court, where they obtained their Commission or Letter of Marque, that service upon him was binding for the Commander, owners, and sureties, and that such owners and sureties are liable to decrees immediately after seizure.

Manual addressed to all Commanders of Privateers, in a separate form from the Instructions issued to the Commanders of King's ships, although on some occasions the Instructions to the Commanders of either class of vessels were conjoint Instructions. These Instructions were binding upon the Commander of every privateer, who upon obtaining a warrant from the Lord High Admiral or the Commissioners for executing the office, was required to appear in the Registry of the High Court of Admiralty, and there make a declaration respecting the tonnage and fittings of his vessel, and to sign and execute a bond to the Crown with two approved sureties, that he would in every respect conform himself to the Instructions issued by the King in Council, and to all future Instructions. It was accordingly to his Instructions that the Commander of every privateer was bound to look for the interpretation of the general language of his Commission, and the authority contained in these Instructions, equally as the Commission, was granted to the Commander personally. It was necessary therefore that the Commander himself should be on board the privateer at the time of its making any capture, in order that the legal interest in the capture should enure to the private captors under the Commission. In the case of the "Charlotte" privateer[42], Lord Stowell held that a capture made by her, when her Commander was on shore, must be condemned as a Droit of the Admiralty. An exception appears to have been made in favour of the captors on one occasion, where the Commander of the privateer being dead, the Lieutenant had captured the prize[43].

[42] The Charlotte, Witt. 5 Ch. Rob. p. 280.

[43] In a MS. note-book in the possession of the author, purporting to contain notes of Sir Nathaniel Lloyd, Advocate Ge-

But in most cases in modern times, where non-commissioned captors have made prize of enemy's property, it has been usual for the Crown to grant to the captors on their petition the ships and goods of the enemy, although the same have been taken without any legal authority or Commission of War. Such is the purport of a Report [44] made by Sir James Marriott, the King's Advocate General, in 1765, to the Lords Commissioners of the Treasury. According to that Report the practice in the High Court of Admiralty of Great Britain has been for the Lord High Admiral to proceed for Droits by his own Law Officers, ever since the time of the Duke of York, who was Lord High Admiral in the reign of King Charles II, and who, subsequently to his appointment and to the Order in Council of 6 March 1666 declaring the Droits of the Lord High Admiral, granted them back to the Crown. This precedent of granting back the Droits of the Lord High Admiral to the Crown was followed by Prince George of Denmark, after he had been appointed Lord High Admiral, and by the Earl of Pembroke; but whilst the office of Lord High Admiral is in Commission, the Droits of the Lord High Admiral remain vested in the Crown.

Restraints upon Privateers.

§ 195. The Commission of a Privateer, although it is issued in general terms, is taken subject to all the restraints which the legislature may have imposed upon it. In the case of British privateers, their Commissions are revocable by the Lord High Admiral or the Commissioners for executing his

neral in 1716, there is this passage: "The Privateer's Captain being dead, the Lieutenant took a prize. Salvo jure Admirali, for once adjudged to the owners of the Privateer. 30 May 1704."

[44] MS. book of Sir James Marriott, in possession of the author.

office. In the case of privateers belonging to the United States of America, their Commissions are revocable by the President. Under the Prize Act of 1812, the President of the United States was empowered to grant, annul, and revoke at his pleasure, the Commissions of privateers, and by the Act declaring War he was authorised to issue the Commission in such form as he should deem fit, and further to establish and order suitable Instructions for the better governing and directing the conduct of private armed vessels commissioned under that Act, their officers and crews. "It has been the great object," observes Mr. Justice Story[45], "of every maritime Nation to restrain and regulate the conduct of its privateers. They are watched with great anxiety and vigilance, because they often involve the Nation by irregularities of conduct in serious controversies, not only with public enemies, but with neutrals and allies. If a power did not exist to restrain their operations in war, the public faith might be violated, cartels and flags of truce might be disregarded, and endless embarrassments arise in the negotiations with foreign Powers." The Commission of a privateer was declared by the British Prize Act to be forfeited upon due proof of the breach of any of his Majesty's Instructions relating to Prize, or of any offence against the Law of Nations; and upon representations being made to the Lords of the Admiralty, that the Commander of any privateer had committed a breach of his Instructions or offended against the Law of Nations, it was usual for them to direct proceedings to be instituted in the Admiralty Court against the privateer to deprive her Commander of his Commission[46]. Such a proceeding

[45] The Thomas Gibbons, 8 Cranch, 428.

[46] The Mariamne, 5 Ch. Rob. p. 10.

was *ad publicam vindictam*, and was intended to prevent a repetition of bad conduct. The misuse of the authority conveyed to the Commander of a privateer by his Commission rendered her Commander and the owners liable in damages to the party injured; and each part-owner, if there were several, was liable not merely *pro rata* for his own share respectively, but for the total amount of what might be awarded against them all[17]. So far back as 1672[18] it was held that every owner of a privateer is liable *in solidum* for damages awarded against the master and owners of the vessel.

Purport of Instructions issued to British Privateers.

§ 196. The Instructions, which have been generally furnished to British privateers, authorise them to attack and seize all men-of-war, ships, and other vessels whatsoever, as also all goods, wares, and merchandises belonging to the enemy, but so as not to commit any hostilities within the harbours of Powers or States at amity with Great Britain, or in their rivers, or roadsteads, within the shot of their cannon; also to attack and seize all ships carrying Contraband of War to the ports of the Enemy, and all ships, whatever be their cargoes, that may be found attempting to enter any blockaded ports It has been usual for the Crown to issue additional Instructions[19] from time to time to privateers, as occasion may require, precisely as to public vessels of war, for the purpose of restraining or enlarging, as the case may be, the exercise of the powers contained in their Commissions. The Commanders are further required by their Instructions to bring their prizes into port for adjudication, to aid and

[17] The Karasan, 5 Ch. Rob. p. 292.

[18] Praris *v.* Captain Martine and his owners, A.D. 1675, Lord Stair's decisions, Vol. II. p. 239.

[19] Marriott's Formulary, pp. 46–49, 54.

succour all co-belligerent vessels, to make reports from time to time of their proceedings to the Lord High Admiral or the Commissioners for executing his office, to refrain from ransoming their prizes, to deliver up all prisoners of war to Commissioners authorised to take charge of them, to send copies of their journals to the Secretary of the Admiralty, and not to hoist any jack, pendant, or other ensign or colours usually borne by King's ships; but besides the colours usually borne by merchant ships, to wear a red Jack with the Union Jack described in the canton at the upper corner thereof, near the staff. Such appears to have been the substance of the Instructions issued on 30 Dec. 1739, for the Commanders of such ships and vessels as may have Letters of Marque or Commissions for private men-of-war against the King of Spain, his vassals, and subjects inhabiting within any of his Countries, Territories, or Dominions, by virtue of our Commission granted under the Great Seal of Great Britain bearing date the thirtieth day of November 1739[50]. It appears that precisely similar Instructions, as to the distinguishing Jack to be carried by British privateers, have been issued on all subsequent occasions.

Distinguishing Flag of British Privateers.

§ 197. The French Ordinance of 1681 may be regarded as furnishing a permanent body of Instructions to the Commanders of all ships having Commissions from the Admiral, but it has been supplemented by Règlemens on the subject of Prize, issued from time to time as circumstances may have

The Flag of Foreign Privateers.

[50] A copy of these Instructions will be found in Beauwes, Lex Mercatoria, edited by Chitty, Vol. I. p. 345. These particular Instructions are silent on the subject of blockade, but Instructions to privateers on the subject of Blockade will be found in Marriott's Formulary, p. 49.

called for them[51]. They are silent on the subject of a special flag to be used by private ships of war, as distinguished from public vessels of war. The ordinance of 15 April 1689 established special ensigns for vessels of commerce, and two other ensigns seem to have been in use in the French mercantile marine before 1789[52]; but since that period the same ensign has been borne by vessels of war as by vessels of commerce, the use of a pendant having been reserved to the former[53]. It does not appear that French privateers are required to carry any special flag to distinguish them from vessels of war belonging to the Crown, although the latter may have been always distinguishable from them in fact by some special signal serving to denote the rank of the naval officer in command of them. By the Law of 31 Oct. 1790, which purports to fix the colours, which the different kinds of French flags used on board of French vessels ought to bear, the *flamme* or pendant is spoken of as the distinguishing mark of vessels of war and other ships of the State; the only other class of vessels mentioned in that Law being vessels of commerce[54].

It does not appear from either of the Spanish

[51] This Ordinance and the supplemental regulations may be consulted in Lebeau, Nouveau Code des Prises, p. 80.

[52] Les vaisseaux marchands porteront l'enseigne de poupe bleue avec une croix blanche traversante, et les armes de S.M. sur le tout, ou telle autre distinction, qu'ils jugeront à propos, pourvu que leur enseigne de poupe ne soit point entièrement blanche. Ordonnance de Louis XII, 15 April 1689, L. III. Tit. III. Art. I. The tricolor ensign, which is borne in the present day by all French vessels, was reestablished as the National ensign by a decree of 7 March 1848.

[53] Ortolan, Diplomatie de la Mer. Tom. I. p. 219.

[54] Code des Prises, et de Commerce, par F. N. Dufriches, Fontaines, Paris, an. xiii. Part II. p. 616. Lebeau, Nouveau Code des Prises, Tom. III. p. 21.

Ordinances[55] to regulate privateering, issued in 1621 and in 1718, that Spanish privateers are required to carry any special flag. The Swedish Ordinance of 1715[56] and the Russian Regulations of 1787[57] are likewise silent upon this head. The Instructions of the President of the United States of America[58], as well as those of the Supreme Director of the United Provinces of South America[59], issued from the Fortress of Buenos Ayres on 15 May 1817, are equally silent. On the other hand, the Danish Prize Instructions issued at Copenhagen on 10 March 1810 announce that those privateers, to which lawful Commissions have been granted, are allowed to carry the Royal Danish Pendant and Ensign with our Royal cypher in the middle of it[60]. It would thus appear that there is no settled Practice of Nations which requires that private ships of war should carry a distinguishing flag, corresponding to the Privateer's Jack, which British privateers are required by the municipal Law of Great Britain to carry, nor any Practice of Nations which forbids private ships of war to carry the pendant or *flamme* which is borne by public vessels of war.

Verification of the military flag of a Privateer.

§ 198. Martens, in his Essay on Privateers,[61] observes, that "notwithstanding the species of military flag which Privateers have the privilege of hoisting, they cannot aspire to that exemption from Visitation on the part of foreign Powers which a Sovereign's ship demands." It seems to be a reasonable pro-

[55] D'Abreu, Tratado sobre Pressas de Mar. p. 309.

[56] Robinson's Collectanea Maritima, p. 167.

[57] Lampredi, Du Commerce des Neutres, Paris, ann. p. 359.

[58] Wheaton's Reports, II. Appendix, p. 80. V. Appendix, p. 112.

[59] Wheaton's Reports, IV. Appendix, p. 29.

[60] Wheaton's Reports, V. Appendix, p. 93.

[61] In a note to p. 41 Martens considers the case of merchant ships in cargo, which are furnished with Letters of Marque.

position, that the Commander of every private ship of war should be required to verify his character by exhibiting his Commission of war to the Commander of any public vessel of war, for public vessels of war are authorised by the Law of Nations to maintain the police of the High Seas, and it would be impossible for them to check piracy, unless they were entitled to verify the military character of every private vessel, which they may find acting as a vessel of war. The ordinary Instructions issued by the maritime Powers of Europe to their public vessels direct them to capture as a Piratical vessel, every vessel committing an act of war on the High Seas without a lawful Commission. Thus in "the Regulations established by the King in Council and Instructions issued by the Lords Commissioners of the Admiralty relating to his Majesty's Service at sea," published by Murray in 1826, it is declared under the head of Prizes and Prisoners of War, "If any ship or vessel shall be taken acting as a ship of war or privateer, without having a Commission duly authorising her to do so, her crew shall be considered as pirates, and treated accordingly." Similar instructions had been issued to British Naval Officers in 1730 and 1806. The Spanish Ordinance of 1621 and the French Ordinance of 1681 were to a similar purport, as they respectively authorised Spanish and French cruisers to capture any vessel, which they might find cruising without a Commission from some Prince or Sovereign State. The Right of *Visit* for the purpose of ascertaining the lawful character of a cruiser is altogether distinct from the Right of *Search*, and a private vessel of war equally as a public vessel of war may be regarded as exempt from *search*. Such seems to be the fair conclusion to be drawn from the case of the Danish Corvette,

St. Juan[62]. Accordingly, as soon as the Commander of a privateer has exhibited his Commission of War to the Commander of a public ship of war, and the Commission is found to be under the Seal of a Sovereign Prince or State, and to warrant the vessel acting as a vessel of war, it is for the Courts of Admiralty of the belligerent Power to determine, whether any act of war, in which the privateer may have been engaged, is warranted by her Commission and the Law of Nations. M. de Hautefeuille is of opinion that the Law of Nations, as received amongst the Maritime Powers, does not authorise the public ships of war of neutral Nations to verify the military character of private ships by inspecting their Commission; but it seems difficult to reconcile his view with the positive Law of so many maritime Powers, whereby their public vessels are authorised to capture, as pirates, every vessel committing an act of war without a lawful Commission.

A neutral merchant-vessel cannot claim to verify a privateer's belligerent character.

§ 199. M. de Hautefeuille[63] contends that the Master of a neutral merchant ship has a right to require the exhibition of the papers of a privateer to prove its national character, as well as the exhibition of the Commission of its Commander, before he permits any officer from the privateer to board his vessel for the purpose of Visitation and Search; but such a refusal on the part of the Master of a merchant ship to allow an officer of the privateer to board his vessel would be equivalent to resistance, and any resistance whatsoever on his part would according to the Ordinances of all the Maritime Powers fully authorise the Commander and crew of the privateer to have

[62] Charles de Martens, Causes Célèbres du Droit des Gens, T. II. p. 183. Ferdinand de Cussy, Causes Célèbres du Droit Maritime des Nations, Tom. II. L. II. c. 8.

[63] Des Droits et des Devoirs des Nations Neutres, Tom. III. Tit. XI. c. 1. s. 1. p. 16.

recourse at once to force, and to make prize of the merchant vessel. Various regulations indeed have been made for restraining the excesses of private ships of war, and one of the earliest of such regulations forbade them under the most severe penalties to do any violence to vessels, which should lower their sails immediately upon being summoned by an affirming gun to heave to, and should submit to the Visit[63]; but it was an accompanying instruction to private ships of war that they might give chase to any vessel, which they might descry upon the High Seas, and summon it by firing a gun to heave to, and if it should neglect to do so, they might then compel it by force; and if any resistance should be made, the vessel should be declared by the Admiralty to be good Prize. Analogous provisions are found in the French Ordinance of 1681[64], in the Spanish Ordinance of 1718[65], in the Swedish Ordinance of 1715[66], and in one of the most recent of modern Ordinances for the regulation of privateers, namely, the Ordinance which was issued by the Supreme Director of the United Provinces of South America in 1817. This Ordinance provided that a merchant vessel belonging to any Nation whatever, that makes any defence after the privateer's hoisting up her flag, shall be declared good Prize, unless her captain shall prove that the privateer gave him sufficient motive for such a resistance[67]. It seems impossible to maintain with good reason in the face of this and other Ordinances of a cognate character extending over a period of three centuries, that the Commander of a privateer

63 Edit concernant la jurisdiction de l'Amirauté de France, Art. 64. A.D. 1584. Lebeau, Nouveau Code des Prises, I. p. 24.

64 Ibid. Art. 65.

65 D'Abreu, p. 320. Art. 13.

66 Robinson's Collect. Maritim. p. 167.

67 Art. 28. Wheaton's Reports, Tom. IV. App. p. 35.

can of Right be required by the master of a neutral merchant vessel to show his Commission and Ship's Papers, before he is to be allowed to exercise his belligerent Right of Visit and Search. Besides, the exercise of the Right of Visit and Search by privateers has been a subject of Treaty-arrangements between most of the maritime Powers of Europe; and one object of such Treaty-arrangements has been to regulate the approach of every privateer, so that it shall not come within a certain distance of a merchant vessel at the time, when its affirming gun is fired by way of summons (*la semonce*). To this summons every merchant ship is bound to pay attention and to lay her sails to the mast, and if possible, to anchor. But no provision is found in any of these Treaties, which authorises the master of the neutral merchant ship to demand the production of the Commission of the Commander of the privateer before he submits to the Visit; on the contrary, if any flight is attempted, the privateer may fire into the neutral merchant vessel, and if the neutral merchant vessel should offer resistance and should be captured, she will be good prize, although her neutral character should be afterwards established[68].

The exercise of the Belligerent Right of Visit and Search regulated by Treaties.

§ 200. The mode of exercising the belligerent Right of Visit and Search[69] is of no slight importance in its bearings upon the degree of respect, which is due from every Belligerent Power towards a Neutral Power. A state of War does not authorise the exercise of force on the part of a Belligerent Power against any Power with which it is at amity; it is only when another Power ceases to be at amity with it, in other words, when it conducts itself as an Enemy, that a Belligerent Power may exercise *jure*

[68] Martens on Privateers, p. 58, who cites a long series of Treaties on the subject.

[69] Supr. p. 180.

belli force against it. The Right of Visit and Search is not a *Natural* Right on the part of a belligerent, as such, against a neutral, as such; it is a *Positive* Right, resting upon custom and tacit compact (*moribus et pacto tacito introductum*[70]), and, as such, is to be exercised according to certain rules. Accordingly we find that no question has been more frequently the subject of Treaty-regulation than the forms to be observed by every Commander of a belligerent ship of war in visiting and searching a merchant vessel sailing under a neutral flag. Private ships of war equally as Public ships of war are empowered by their Instructions to visit and search neutral vessels, and their Commission of war is their sufficient warrant against neutral Powers for exercising such belligerent Rights. It was an invariable provision of such Treaty-regulations that privateers should fire a blank charge from a gun at a given distance from every merchant vessel, which they intended to visit; and this distance was in some Treaties specified as beyond cannon-shot, in others as within cannon-shot, but in no treaties as a less distance than a half cannon-shot. Thus it was specified in the Treaty of Commerce between Great Britain and France of 1786[71], that all cruisers, whether public or private ships of war, should remain at a distance beyond cannon-shot (*demeureront hors de la portée du canon*) whilst exercising the Right of Visit; on the other hand, in the Treaty of Commerce between France and Russia of 1787 it was stipulated that no public or private ship of war should approach nearer than a half cannon-shot, whilst exercising the Right of Visit[72]. One

[70] Cf. Part I. § 76.

[71] Martens, Récueil, IV. p. 171.

[72] Il n'est pas moins strictement ordonné aux dits vaisseaux de guerre ou armateurs, de ne jamais s'approcher desdits navires marchands qu'à la distance au plus de la demi-portée du canon. Martens, Récueil, IV. p. 212.

object of a cruiser's remaining at a reasonable distance on such occasions is to avoid giving rise to any alarm or misgiving on the part of the master of the merchant vessel as to the true character of the cruiser; on the other hand, it will be necessary for the cruiser to remain within such a distance, as will enable it promptly to give support, if required, to the boat's crew, which it may have sent alongside the merchant vessel. According as one or other of these two considerations have preponderated in the minds of the framers of Treaties, the distance at which cruisers are to remain, whilst exercising the Right of Visit, has been enlarged or reduced. Although there may thus be some variations in the stipulations of Treaties as to the actual distance at which a cruiser is bound to remain after it has fired its affirming gun, and whilst its boat's crew goes alongside the merchant vessel, there is a general uniformity in the provisions of such Treaties as to the mode in which the actual visit shall be made, namely, by sending a boat alongside the merchant vessel manned by so small a crew, that its approach can cause no just alarm to the master of the merchant vessel. It was a provision of the Swedish Ordinance of 1715, as well as of the Spanish Ordinance of 1779, that the Commander of a privateer might require the master of a merchant vessel to come with his papers, or to send them by one of his crew on board the privateer, and that if the Commander of the privateer was not satisfied with the papers, he might send some of his own men on board the merchant vessel to inspect still further her documents. But Sweden, in a Treaty of Commerce concluded with the Two Sicilies in 1742[73], agreed that the privateers of either Nation should not approach nearer to the merchant ships of the

73 Wenck, Codex Jur. Gent. Tom. II. p. 137.

other Nation than a cannon-shot, and should send a boat alongside them for the purpose of visit with two or three men on board at most, besides the rowers, and that not more than those two or three men should go on board the merchant vessel. Sweden likewise, in her Treaty with the United States of America in 1783[74], agreed that the respective cruisers of the two Powers should exercise their belligerent Right of Visit at a distance greater than a cannon-shot, and should send a boat alongside with two or three men at most to go on board of the merchant vessel. Spain in like manner, in her Treaty with the United States of America in 1795[75], agreed that the cruisers of either Nation in exercising their belligerent Right of Visit should remain out of cannon-shot, and should send a boat's crew alongside the merchant ship, out of which two or three men only should go on board the vessel. Spain had agreed to observe the same rules in a Treaty concluded with England in 1667, which was renewed by Art. II. of the Treaty of Versailles, 1783, which latter Treaty was confirmed by the first additional Article to the Treaty of 5 July 1814[76]. There is thus a general concurrence of principle amongst Nations as to the mode in which the actual Visitation of a neutral merchant ship is to be made by every belligerent cruiser, namely, that it is to be conducted in such a manner as to cause no alarm to the commander and crew of the merchant ship, and at the same time without any hostile demonstration of force; and it may fairly be maintained that no Commander of a belligerent cruiser can capriciously depart from the established practice without

74 Martens, Récueil, III. p. 597.
75 Art. 18. Martens, Récueil, VI. p. 160.
76 Art. 14. Hertslet's Treaties, II. p. 147.

incurring a responsibility to the Neutral Nation, upon whose Rights of Independence it will have thereby unduly trespassed. It should be borne in mind that it is by the Custom of Nations that the cruisers of a belligerent Power are authorised to visit and search neutral merchant ships on the High Seas in assurance of their good Faith, and that although a Belligerent Power would be justified in regarding a Neutral Power, which should refuse to allow its merchant vessels to be duly visited and searched, as an adherent of the Enemy, and in treating it accordingly, yet the Belligerent is not the less bound in good Faith towards the Neutral to observe those forms, which are of the essence of the Custom, and the observance of which enables a Neutral to recognise the exercise of Belligerent Right in a proceeding, which under any other form would be a Maritime Trespass.

Privateers not admitted to the same Comity as Public Ships of War.

§ 201. The Comity which is extended by the practice of Neutral Powers to the Public vessels of war of a belligerent Power, in admitting them into its ports, is not invariably extended in an equal manner to Private ships of war. It is competent indeed for a Neutral Power to grant free access to its ports to all privateers with their prizes; and if it has granted such access to them, it is not at liberty to interfere with their possession of those prizes, whilst they are within its jurisdiction, unless the capture of them should have involved a violation of the Sovereignty of the Neutral Power. For instance, if a privateer should have entered any port of the Neutral Power prior to making capture of an enemy's ship, and should have augmented her crew in that port without the permission of the Neutral Power, and thereupon should have sailed out and captured a merchant vessel, and brought her as prize of war into a port

of the Neutral Power; or if a privateer should have made capture of a merchant ship within the Jurisdictional waters of a Neutral Power, and brought her prize into a port of the Neutral Power, under such circumstances the Neutral Power may assert its right of Sovereignty, and set the captured vessel at liberty. But Neutral Powers are for the most part accustomed to refuse to privateers all access to their ports with their prizes, unless they should be driven in by stress of weather, when motives of humanity towards both the privateers themselves and their prizes dictate, that they should be admitted. In such cases however the privateers may be required, and are in fact generally required, to put to sea again as soon as the weather will permit. Some Powers have been accustomed to forbid all access to their ports during war to privateers, whether they have prizes or not with them, except under circumstances of necessity; other Powers again have permitted the privateers of a belligerent Power generally to enter their ports, to continue therein, and even to sell their prizes, after sentence of adjudication has been passed in the Prize Courts of the belligerent Power. During the war of the Allied Powers against Russia in 1854, all the Baltic and Mediterranean Powers, which remained Neutral, issued Proclamations forbidding privateers to enter their ports, except under stress of weather; and Sweden[77] went so far as to forbid them to stay in her roadsteads. It may be inferred from the practice of Neutral Powers in thus issuing Proclamations, if they see fit, to announce their intention to exclude privateers from the Comity which is exhibited towards Public ships of war, that unless a Neutral State has so signified its determination to

77 Edict of 4 April 1854.

refuse to privateers the privilege of asylum within its jurisdictional waters, every belligerent Power is entitled to presume that the usual Comity will be shown to its privateers, and to insist upon their enjoyment of it, subject however to any regulations and limitations which the Neutral State may choose to prescribe for its own safety or convenience. There are cases indeed in which an independent Power has bound itself by Treaty with another independent Power to admit the privateers of the latter Power with their prizes into its ports, and to refuse to the privateers of the Enemy the like asylum; but such Treaties have been Treaties in the nature of Alliance, such as the Treaty of 1654[78] between Great Britain and Portugal, and the Treaty of 1778 between France and the United States of America[79], and involve a departure from a strict neutrality[80].

Restrictions upon Privateers in neutral waters.

§ 202. It is competent for every Neutral Power in admitting the Privateers of a Belligerent Power into its ports and harbours, to enforce such rules and regulations for their conduct, as to it may seem fit, with a view to maintain the peace of its jurisdictional waters, and to preserve in the interest of the Belligerent Power itself the Right of Neutral Asylum from violation. It may accordingly prohibit a belligerent privateer from lying in wait for the enemy's vessels at the mouths of its rivers or harbours[81], or from leaving its jurisdictional waters in order to attack an enemy's vessel which is approaching them, or from sending out her boats whilst she is lying within neutral territory to attack an enemy's vessel which is lying outside of the neutral terri-

[78] Dumont, Traités, Tom. VI. Part II. p. 82.

[79] Martens, Récueil, Tom. II. p. 587.

[80] The Eliza Ann, 1 Dodson, p. 244.

[81] Azuni, Droit Maritime, c. 5. Art. I. Martens, Précis du Droit des Gens, p. 251. The Anna, 5 Ch. Rob. p. 385.

tory[82], or from setting sail in pursuit of an enemy's vessel which has quitted a neutral port until after the lapse of twenty-four hours[83], or from attempting to recapture any prize which has been brought into neutral waters by an enemy privateer, or from selling its own prizes in neutral waters before adjudication, or from doing anything to vary its own *status* or that of an enemy vessel, such as may have been the *status* of either at the time of its entering within the jurisdictional waters of the Neutral Power. The Neutral Power is also at liberty to prohibit every belligerent Privateer from enlisting marines or seamen within its ports, or from augmenting its armament, or taking on board any munitions of war, whilst it is within its jurisdictional waters; but it is the privilege of the Neutral Government, and not of the Enemy-Power, to complain of any contempt of the Sovereignty of the Neutral Power, which is implied in what is technically termed a violation of its territory. Thus Lord Stowell held, that a privateer which was *accidentally* lying in a neutral port, and saw an enemy's vessel approaching it, might go out, and, as far as the enemy was concerned, rightfully capture the vessel, provided this was done beyond the limits of the port[84]. It is competent however at all times for a Neutral Government, if it thinks fit, to prevent by force any privateer from quitting its port for the purpose of attacking another vessel[85] which is in sight. So with regard to Privateers

[82] The Twee Gebroeders, 3 Ch. Rob. p. 164.

[83] Azuni, c. 5. Art. I. Kent's Commentaries, I. p. 123. Lampredi, del Commercio de Popoli Neutrali in tempo di guerra. Parte Seconda, No. XI. where the Regulations of various Italian States are given *in extenso*.

[84] The Vrow Anna Catherina, 5 Ch. Rob. p. 18.

[85] Azuni, c. 5. Art. I. Lampredi, Part II. No. XI.

which have been armed or manned in Neutral ports, their captures on the High Seas would be sustained in a belligerent Court of Prize, notwithstanding they might have violated the Municipal Law of a Neutral Power in order to further the object of their cruise, whilst they were within its jurisdiction, unless the Neutral Power should intervene to put in a claim of Sovereignty over the place of capture; for an Enemy cannot be allowed in a Court of Prize to set up as a bar to the exercise of belligerent Right the privilege of a third party. On the other hand, if any such privateers should have brought their captures within the jurisdiction of the Neutral Power, whose Municipal Law they have so violated, the Courts of the Neutral Power will interpose to restore the captured property to its original owner, on the ground of its capture having been effected by means, which have involved a violation of its Sovereignty. The Courts of the United States of America have repeatedly adjudged property captured under such circumstances to be restored to its original owners, where it has been brought by the captors within the jurisdictional waters of the United States[86]; but they have likewise held that an augmentation of force or illegal outfit within neutral territory will not affect any capture made after the termination of the original cruise, for which such augmentation or outfit was made[87].

Treaty-Restraints upon neutral Subjects' accepting commissions from belligerent Powers.

§ 203. Under the Common Law of Nations a Belligerent Power may enlist into its military or naval service any individuals whatsoever, notwithstanding they may be the natural born Subjects of other Powers, just as it may invoke the aid of other

[86] The Gran Para, 7 Wheaton, p. 471. The Arrogante Barcelona, 7 Wheaton, p. 496.

[87] The Santissima Trinidad, and the St. Ander, 7 Wheaton, p. 283.

independent Powers to take part with it against its Enemy, and form alliances with them. The Swedish Ordinance of 1715, as already observed, alludes expressly to the Subjects of Foreign Powers, who may be disposed to accept Swedish Commissions of War; and under the common Law of Nations it is competent to a Belligerent Power to grant Letters of Marque to any person who may be disposed to apply for them. But in process of time, as the friendly intercourse of Nations came to be cemented by Treaty-engagements in maritime matters, it was found expedient, and became customary, to introduce a provision into Treaties of Commerce, whereby each of the Contracting Parties undertook not to suffer its Subjects to accept Letters of Marque from any Foreign Power, which might be the Enemy of the other Party. One of the earliest instances of such an engagement between two independent Powers is found in the Treaty of Westminster[88] (29 Nov. 1669), concluded between Charles II of England and Frederick III of Denmark.

Art. XXXI. Subditis amborum Regum incolisve Regnorum aut Terrarum illis obedientium licitum non erit ab aliquo Principe vel Statu, cui cum alterutro Fœderatorum discordia aut bellum apertum erit, Litteras Patentes, quas Commissiones vocant, aut Repressalia impetrare, multo minus vi istarum Litterarum subditos alterutrius aliqua molestia aut damno afficere; uterque dictorum Magnæ Britanniæ et Daniæ Regum subditos quisque suos stricte prohibebit ullas ejusmodi Commissiones ab aliis principibus, aut Statibus obtinere vel accipere, sed quantum in ipsis erit, deprædationes omnes vi talium Commissionum fieri omnino vetabit.

In the next following century we find various independent Powers entering into Treaty-engagements under which they agreed to prohibit their

[88] Dumont, Traités, Tom. VII. Part I. p. 129.

subjects from accepting Letters of Marque or Commissions of War from Foreign Powers, under pain of being treated and punished as Pirates. Thus in the Treaty of Commerce concluded between France and the States General[89], on 21 Dec. 1739, it was provided as follows:—

Art. XXXIII. Les sujets des dits Seigneurs Etats Généraux ne pourront prendre aucune Commission pour des armemens particuliers ou Lettres de représailles des Princes et Etats, qui pourroient devenir Ennemis de sa Majesté, ni troubler ou endommager d'aucune manière ses Sujets, en vertu de pareille Commission ou Lettres de représailles, ni même s'en servir pour aller en course, à peine d'être poursuivis et chatiés comme Pirates: ce qui sera pareillement observi par les sujets de sa Majesté à l'égard de ceux des Provinces Unies, et seront à cette fin toutes et quantes fois que cela sera requis de part ou d'autre, dans les terres de l'obéissance de sa Majesté, ou dans les Provinces Unies, publiées et renouvellées défenses très expresses et très précises, de se servir en aucune manière de pareilles Commissions ou Lettres de représailles, sous la peine sus-mentionnée, qui sera exécutée sevèrement contre les Contrevenans, outre la restitution entière de laquelle ils seront tenus envers ceux auxquels ils auroient causé du dommage.

Provisions of a similar character are found in the Treaties concluded between Sweden and the Two Sicilies in 1742[90], between Denmark and the Two Sicilies in 1748[91], between the United Provinces and the Two Sicilies in 1753[92]; and in various Treaties concluded in the course of the eighteenth century between the Christian Powers of Europe and the Ottoman Porte[93]; and between the Christian Powers of Europe and the Dependencies of the Ottoman Porte

89 Wenck, Codex Juris Gentium, Tom I. p. 429.

90 Wenck, Tom. II. p. 136. Art. 23.

91 Ibid. p. 298. Art. 32.

92 Ibid. p. 771. Art. 36.

93 Treaty between the Two Sicilies and the Ottoman Porte in 1740. Wenck, Tom. II. p. 526. Art. 18.

on the Barbary Coast. The object of these latter Treaties was to familiarise the Mahommedan Powers with the principles of Law which regulated the mutual relations of the Christian Powers, and to accustom them to respect them under the sanction of Treaty-engagements. The States of the New World have also in their turn been ready to co-operate in one system of Conventional Law on this subject with the States of the Old World. Thus the United States of America entered into Treaty-engagements prohibiting their citizens from taking Letters of Marque from foreign Powers, with France in 1778[94]; with the United Provinces in 1782[95]; with Prussia in 1785[96]; and with Great Britain in 1795[97], and also with Spain in 1795[98]. Most of these Treaties, with the exception of that with Prussia, the provisions of which on this head were renewed by the Treaty of 1 May 1828[99]; and possibly with the exception of that with Spain, are no longer in force, and their stipulations may have ceased to be obligatory, but their provisions serve to indicate the course in which the public opinion of the more civilised States of Christendom upon this subject has been steadily advancing.

Municipal prohibitions against Subjects accepting Letters of Marque from foreign Powers.

§ 204. It will have been observed, that by the Treaty of Westminster (29 Nov. 1669), the contracting Parties agreed to prohibit their Subjects from accepting Letters of Marque from any foreign Power against the Subjects of the other Party. The United Provinces had issued such a prohibition to their citizens as far back as 12 May 1611[100]; and

94 Martens, Récueil, II. p. 597. Art. 21.
95 Ibid. III. p. 447. Art. 19.
96 Ibid. IV. p. 45. Art. 20.
97 Martens, Récueil, V. p. 678. Art. 21.
98 Ibid. VI. p. 154. Art. 14.
99 Martens, N. R. VII. p. 619. Art. 12.
100 Groot Placaat Boek, Tom. I. p. 968.

it appears to have become the rule in the course of the seventeenth century for the European Powers to issue general Ordinances[1] to that effect, or to publish special Edicts at the commencement of any war, in which they desired to remain neutral. Such appears to have been the course adopted by Great Britain in 1677, after the conclusion of the Treaty of Westminster, when it seems to have been thought expedient by the British Government to determine with precision, what were the legal obligations upon the Subjects of the contracting Parties resulting from that Treaty. The following case was accordingly submitted by the Lords of his Majesty's Privy Council forming the Committee of Trade and Plantations to Sir Thomas Exton and Sir Richard Lloyd, two of the most eminent civilians of that period, as appears from the Journal of that Committee[2] of November 1677 :—

It is agreed that the following question be sent to His Majesty's Counsel, learned in the Common and Civil Laws, for their opinion thereupon, viz.

Whether the Kings of England having made alliance, by Treaty and League, with any foreign Prince or Potentate, and thereby agreeing to punish with extreme or utmost punishment such, as by colour of Commissions from Enemies to his said Allies shall take arms against the King's Peace and Treaty proclaimed and spoil the King's Allies, be not a levying a war against the King, and punishable by Death? Or what crime is it, and how punishable?

It is our humble opinion that this is not a levying a war against the King, nor by the Law of the land punishable

[1] Ordonnance de la Marine of 1681, Tit. Prizes, Art. 3.

[2] A copy of this Report is in a MS. book from the library of the late Sir James Marriott, King's Advocate General (1764), in the possession of the author.

by *Death*. It is a crime against His Majesty's Treaties of Peace, and the strict Proclamation he has been pleased to set forth to enjoin the due observance of them. It is also an offence against the Law of Nations, and by the Civil Law it is *crimen læsæ majestatis*. But by the Law of England we do conceive it to be no more than a Conspiracy against His Majesty's Crown and Dignity, and by the Statute for the trial of piracy (28 Henry VIII. c. 15.) punishable only by Fine and Imprisonment; and there is an offender in the Marshalsea who hath accordingly been so punished[3].

THOS. EXTON.
RICH. LLOYD.

Nov. 21. 1677.

Privateers under special conventions Piratical vessels.

§ 205. Such was the view taken by very high authorities in the seventeenth century of the legal character of the offence, which the Subjects of a Sovereign Power commit in accepting Commissions of War from a foreign Prince against a State, which is at amity with their Sovereign, contrary to the express stipulations of existing Treaty-engagements between their Sovereign and that State. It remains to be considered what is the effect of the provisions of subsequent Treaties made in the eighteenth century, under which it has been agreed that the Subjects of either contracting Party should be punished as Pirates, in case they should accept Commissions of war or Letters of Marque against the other Party, whilst it is at amity with their Sovereign. It may be accepted as a sound position of Public Law, that

3 This opinion is given without the question in Chalmers's "Opinions of Eminent Lawyers," Vol. II. p. 329; from which it appears that the Lords present in the Council Chamber at Whitehall on this occasion were the Lord Privy Seal, Lord Falconbridge, Marquis of Worcester, Mr. Secretary Coventry, the Earl of Craven, Mr. Secretary Williamson, Mr. Chancellor of the Exchequer.

no person who has a Commission of War from a Sovereign Prince commits piracy under the Common Law of Nations in attacking the subjects of the Power, against which the Commission has been issued. It was however the expressed opinion of Sir Leoline Jenkins[4], in 1675, that the Commander of a privateer, although he had a regular Commission from the King of France, was liable to be treated as a Pirate under the Law of Nations for having exceeded the terms of his Commission; but Bynkershoek[5] has combated this opinion, and Chancellor Kent considers the reasoning of Bynkershoek to be just. Chancellor Kent goes on to observe[6], that if a natural born Subject were to capture property belonging to his fellow Subjects under the authority of a Commission from a foreign Prince, he would upon general principles of Public Law be protected by his Commission from the charge of Piracy; but it will be competent for every Sovereign Prince to declare that if any of his own natural born Subjects commit any act of hostility against others of his Subjects under colour of any Commission from any Foreign Prince, such offender shall be deemed and adjudged to be a Pirate, and if convicted in his Courts, shall suffer such pains of death and loss of lands and goods as pirates, felons, and robbers upon the sea ought to suffer. Such in fact are the provisions of the English Statute 11 and 12 Will. III. c. 7, and of the Act of Congress of the United States of America passed 7 April 1790, sect. 9. But Municipal regulations in matters over which all Nations have a concurrent jurisdiction, are only operative where the Municipal jurisdiction may be applied

4 Life of Sir Leoline Jenkins, Vol. II. p. 754.

5 Questiones Jur. Publ. L. I. c. 17.

6 Commentaries on American Law, Part. I. sect. 9. p. 191.

consistently with the general principles of Public Law, to persons who owe allegiance to the Law-making Power. No Power can make an offence to be Piracy within the purview of the Law of Nations[7] by declaring it to be so. To make an offence Piracy, which has not been so considered and treated in practice by all civilised States, it must be so agreed to be by a General Convention amongst all civilised States. Such was the view maintained by Lord Stowell in regard to the African Slave Trade, that although formal Declarations had been made by individual States against that Trade, and Laws enacted by them, and Treaties concluded by them, yet there were other Nations which adhered to the ancient practice under all the encouragements which their own Laws could give it, and that the doctrine of Courts of the Law of Nations relatively to them must be, that their practice is to be respected[8]. With regard therefore to Treaties, under which the contracting Parties have agreed that their subjects or citizens, who may contravene them, shall be punished as Pirates, the obligation of the Treaties is confined to the contracting Parties, and does not extend to any third Party. In the case therefore in which two States, such as the United States and Prussia, are under Treaty-engagements that no subject or citizen of either of the contracting Parties shall accept a Commission or Letter of Marque from a foreign Power against the other Party under pain of being treated as a Pirate, it is obvious that each of the contracting Parties has undertaken not to make any reclamation against the other, if it should punish as Pirates such of its subjects or citizens as may so conduct

Distinction between Piracy under special Convention, and Piracy under the Common Law.

7 Kent's Commentaries, I. p. 125.

8 Le Louis, 2 Dodson, p. 210.

themselves. But if the United States should be at war with Austria, and Austria should have granted a Commission or Letters of Marque to a natural born Subject of Prussia, and if an Austrian privateer under the command of such natural born Subject of Prussia should be captured by a United States' cruiser, a complicated question of Public Law might arise, if the United States Government should propose to punish such a person, as a Pirate, against the reclamation of Austria, for Austria will have been no party to the Treaty-engagements between the United States and Prussia; and Austria is entitled by the Law of Nations to grant Letters of Marque to any person who will accept them, and to claim for all parties acting under such Letters of Marque all the *jura belli*, which the Common Law of Nations sanctions. During the war between the United States and Mexico, the President of the United States recommended to Congress to provide by Law for the trial and punishment, as Pirates, of any Spanish subjects, who should be found guilty of privateering against the United States, as by the Treaty of 20 Oct. 1795 it was agreed between Spain and the United States that if any person of either Nation should take a Commission or Letter of Marque from a foreign Power against the citizens of the other, he should be punished as a Pirate. Congress accordingly passed an Act on 3 March 1847, declaring it to be Piracy for any subject or citizen of a foreign State to make war upon the United States, or to cruise against their vessels or property, contrary to the provisions of the Treaties existing with that State. Mr. Lawrence has observed, that this Act of Congress is an extension of the crime of Piracy as known to the Law of Nations[9]. It further appears, that on a suggestion

9 Lawrence's Wheaton, 2d annotated edition, Lond. 1863, p. 254.

that a notice had been given by the United States Government that they would treat as Pirates any foreigners found on board Mexican privateers, the British Minister at Washington was instructed to express to the Government of the United States, that it was the expectation of the British Government that the threat would not be put into execution against any British subject[10]. Other considerations of Law would apply to the case, if Prussia were the Power which proposed to punish such a person as a Pirate under the provisions of its Municipal Law, for Prussia by the Law of Nations may enforce its Territorial Law against all its natural born subjects, if they come within its jurisdiction.

The general principles of Public Law will continue to govern the cases to which they apply, notwithstanding that the Territorial Law of the State, the Courts whereof are called upon to adjudicate upon such cases, may be altogether at variance with those principles. Thus the Courts of the United States, which would be bound by the Territorial Law of the United States to sentence to death, as a pirate and felon, any citizen of the United States, who should commit any act of hostility against the United States or any citizen thereof under colour of a Commission from any foreign Prince, have held that there is no reason why an Enemy's subject should not have granted to him by the President of the United States a Commission against his own country, as Commander of a privateer. "There is no positive law," observes Mr. Justice Johnson, in delivering the judgment of the Supreme Court, "prohibiting it; and it has been

[10] Hansard's Parliamentary Debates, Series III. Vol. 89, p. 163, 21 Jan. 1847. Lawrence's Wheaton, London, 1863, p. 654.

the universal practice of Nations to employ foreigners, and even deserters, to fight their battles. Such an individual knows his fate, should he fall into the hands of the Enemy; and the right to punish in such a case is acquiesced in by all Nations. But, unrestrained by positive law, we can see no reason why this Government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his National character[11]."

Conventions against the Employment of Privateers.

§ 206. Endeavours have been made from time to time by individual States to discourage the practice of granting Commissions of War to the Commanders of private ships. Thus Sweden and the United Provinces agreed in a Treaty of Commerce concluded at Stockholm on 26 Nov. 1675, "that none of their subjects should be allowed to equip Privateers[12] against the subjects of the other, nor to accept Commissions of War from their respective Confederates; and that each of the contracting Parties would use their best endeavours to persuade their respective Confederates not to grant Commissions to private ships. It appears however from the separate articles of the subsequent Treaty of Peace concluded between these two Powers at Nimeguen on 12 Oct. 1679[13], that the exigencies of war had compelled Sweden to depart from her Treaty-engagements, and to issue Commissions of War to private ships after the example of France, her Confederate in the war, and that the States General at the conclusion of the war demanded and obtained compen-

[11] The Mary and Susan, 1 Wheaton, p. 57.

[12] Quod nemo respective subditorum vel incolarum earum Armaturam Navalem exercere audeat, quam *Commissievaerders* vocant. Dumont, Traités, Tom. VII. Part I. p. 318.

[13] Ibid. p. 432.

sation from the Swedish Government for certain of their Subjects, whose vessels and cargoes had been captured by Swedish Letters of Marque in violation of the Treaty-engagements between the two Powers. No further attempt seems to have been made in this direction until the United States of America claimed a place in the Family of Nations, when a Treaty was concluded between the United States and Prussia on 10 Sept. 1785, which does not appear to have gone quite so far as to bind either Party to renounce the practice of granting Commissions of War to private ships, but only bound each of the contracting Parties in case of war between them not to issue Commissions authorising privateers to commit depredations on the merchant vessels of the other party freighted with innocent cargoes[14]. With regard to a third Power with which either Party might be at war, the continuance of the practice of arming private ships against them was evidently contemplated, and express provisions were made securing to the privateers of either Party a free admission with their prizes into the ports of the other Party. This Treaty was negotiated by Benjamin Franklin, whose real object appears to have been to obtain for private property on the High Seas an immunity from belligerent capture, in cases where it was not of a Contraband character and under transport to an Enemy's country; and the abolition of privateers was one of the means

[14] Tous les vaisseaux marchands et commerçans, employés à l'échange des productions de différens endroits, et par conséquent destinés à faciliter et à répandre les nécessités, les commodités, et les douceurs de la vie, passeront librement et sans être molestés. Et les deux Puissances Contractantes s'engagent à n'accorder aucune Commission à des vaisseaux armés en course, qui les autorisat à prendre ou à détruire ces sortes de vaisseaux marchands, ou à interrompre le commerce. Martens, Recueil, IV. p. 47. Art. XXIII.

through which he hoped to attain to that object. Upon this supposition the policy of the President of the United States on the recent occasion of the Declaration of Maritime Law made at the Congress of Paris in 1856, involves no departure from the policy of the United States in 1785[15].

Declaration of the Congress of Paris.

§ 207. The Declaration of the Congress of Paris of 16 April 1856 was, that "Privateering is and remains abolished[16]." Mr. Lawrence in his last edition of Wheaton's Elements has very justly remarked that this Declaration is only binding upon the Parties to it, and does not constitute Privateering an offence against the Law of Nations. "The Declaration," he says, "is only a pledge on the part of the States adhering to it, not to issue Commissions for that purpose, and does not of itself create any new offence against the Law of Nations; while the admission of the Congress, made at the suggestion of the Russian plenipotentiary, that it would not be obligatory on the signers of the Declaration to maintain the principle of the abolition of Privateering against those, which did not accede to it[17], received a practical construction in the course adopted by England and France, and other countries, in their Declarations, with respect to the pending contest in America[18]." As Reciprocity is an implied condition of all Rights and Obligations under the Common Law of Nations, and as the Right of issuing Commissions and Letters of Marque to the Com-

[15] The second annotated edition of Wheaton's Elements of International Law, p. 628, published in 1863, deserves to be consulted on this subject. It has been enriched with various notes by its able editor, Mr. William Beach Lawrence.

[16] La course est et demeure abolie. Martens, N. R. Gén. XV. p. 792.

[17] Protocol No. 23. Séance des 14 Avril 1856. Martens, N. R. Gén. XV. p. 768.

[18] Lawrence's Wheaton. London, 1863, p. 255.

manders of private ships of war is a Common Law Right, it would seem that the more complete view of the operation of the Declaration of Paris on the Rights and Obligations of the respective Parties to it, would be that it has in no way affected the Common Law Rights and Obligations of any of those Parties towards those Nations, which have not acceded to the Declaration. Accordingly, if Austria were to become involved in war with the United States of America, the Common Law of Nations would regulate the Rights and Obligations of either Power in regard to the use of Privateers, with this difference however, that whilst the United States of America would be at liberty to instruct its privateers to visit, and if there was probable cause, to capture all neutral vessels equally with enemy-vessels, Austria being a party to the Declaration of Paris would be bound to instruct her privateers to refrain from molesting in any way vessels belonging to Subjects of any of the Powers, which have acceded to the Declaration of Paris, inasmuch as the use of privateers as regards the Parties to that Declaration is abolished.

CHAPTER XI.

ON THE RIGHTS AND DUTIES OF NEUTRAL POWERS.

Views of Grotius as to the relations between Belligerents and Neutrals—Increased importance of the subject in the Eighteenth Century—Bynkershoek's views—Views of Wolff and Vattel—Views of Martens—Perfect liberty of commerce within the territory of a Neutral Power—Distinction between trade on the High Seas and trade within the territory of a Neutral Power—Exceptional *Status* of the merchant on the High Seas—The Political duty of Neutral Nations towards Belligerents—Inviolability of the territory of a Neutral Nation—The Passage of Belligerents through Neutral territory—Hospitality to Belligerent ships discretional on the part of Neutral Powers—Neutral Rights of Police over Belligerent vessels of war in Neutral waters—Right of a Neutral Power to exclude privateers and all prizes of war from its ports—Belligerent privilege of Asylum in Neutral waters—Right of a Neutral Power to allow Belligerent Powers to recruit troops within its territory—Views of the United States Government as to a Belligerent enlisting troops in Neutral territory—Right of a Neutral Power to prohibit the enlistment of troops within its territory.

Views of Grotius as to the relations between Belligerents and Neutrals.

§ 208. GROTIUS in treating of Neutrals in War (*qui in bello medii sunt*) observes, that it may appear superfluous to treat of those, who are not parties to a war, since it is manifest that there are no Rights of war against them. But as upon occasion of war many things are accustomed to be done to Neutrals, especially when they are neighbours, under pretext

of necessity, it may be proper here briefly to repeat what has been said already, (L. III. c. 2. § 10.) that the necessity ought to be extreme, in order to give to a party a right over another's property. That it is further requisite, that the owner of the property should not be under an equal necessity; that if the necessity is evident, more ought not to be taken than is strictly required; that if the bare custody of the thing is sufficient, it is not to be destroyed; and if it be requisite to destroy it, full compensation for it should be made. Having illustrated the application of the above principles by examples of the conduct of Belligerents towards Neutrals, drawn from the records of Greek and Roman history, Grotius proceeds to discuss the duties of Neutrals towards Belligerents. "On the other hand," he says, "it is the duty of those who abstain from war, to do nothing whereby the party who maintains a bad cause may be strengthened, or whereby the operations of the party who wages a just war may be impeded, and in a dubious cause to show themselves impartial by allowing to either party free transit, by supplying their troops with provisions in their march, by not relieving the besieged[1]."

Such is the substance of a brief chapter on the subject of Neutrals in time of War, which was in all probability fully commensurate with the limited importance, which attached to the subject in the early part of the seventeenth century

§ 209. To the Publicists however of the eighteenth century the Rights and Duties of Neutral Nations was a subject of greater interest. The Wars of Religion in the seventeenth century had brought

Increased importance of the subject in the eighteenth century.

[1] In re vero dubia æquos se præbere utrisque, in permittendo transitu, in commeatu præbendo legionibus, in obsessis non sublevandis. De Jure Belli et Pacis, L. III. c. 17. § 1, 3.

almost all the Maritime Powers of Europe into the battle-field, and in proportion as the area of Maritime Warfare became enlarged, there was a greater tendency on the part of Belligerents to invoke unduly the pretext of necessity, as supplying a warrant of Right on their part to interfere with the commerce of Neutrals on the High Seas. Again, the sanctity of Neutral waters was a question, which involved many considerations of Right in regard to the innocent use of them, which did not have any application to Neutral soil; so that Publicists writing at the time, when the works of Bynkershoek (A. D. 1737) and of Wolff (A. D. 1749) appeared, might be expected to devote to the subject of Neutral Rights and Duties far more attention than they had received at the hands of the philosopher of Delft (A. D. 1625). Vattel, the pupil of Wolff, has devoted still further attention to this subject, and subsequent writers have not failed to enlarge upon it. It has however been reserved for the Judges of the Supreme Court of the United States of America, during the early part of the nineteenth century, to give the fullest and clearest exposition of the Rights of Neutral Nations, as the attitude of Neutrality which the United States maintained during the greater portion of the time, when Europe was arrayed in arms against the military genius of the First Napoleon, required that her Judges should expound the Rights and Duties of Neutrals on numerous occasions, when her Courts were called upon to vindicate the Sovereign Rights of the United States, as a Neutral Nation, against the cruisers of the Belligerent Powers.

Bynkershoek's views.

§ 210. Grotius, in the passage already cited, has made a distinction in the duties of a neutral Nation towards two or more belligerent Nations, according

as Right preponderates in favour of one or the other of the belligerent Parties; but in the system of Grotius the term War is used to designate any state of Contention by Force, (*Status per vim certantium, quâ tales sunt,*) whereas in the system of later publicists War is regarded as a Contention of Right by Force (*juris sui persequendi causa concertatio,*) and the term War is used to denote the state or condition of Nations which prosecute their Right by Force. Under this view of the nature of War it is the duty of Nations which have determined to take no part in the contention of belligerents, to refrain from showing favour to either Party, irrespective of all question of Right preponderating on the one or the other side; for to show favour to either of them on the ground of Right preponderating on its side would be to prejudge the question of Right, which they have determined to refer to the arbitrament of War, as too dubious to admit of being settled by an appeal to Reason. Bynkershoek[2] accordingly observes, in commenting on the passage of Grotius, that "the justice or injustice of a war does not affect a common friend: it is not his business to sit as judge between two friends, and make each of them in turn his enemy, and to give or deny to one or the other more or less, according as he thinks his cause just or unjust. If I am neutral (*medius*) I cannot benefit the one, so as to do an injury to the other. But, a party may say, I will benefit both belligerents alike; I will carry to them both articles of the same character, and it is not my concern if they use them to injure one another." But here, to give the substance of Bynkershoek's further observations, both Reason and Usage intervene, and place restraint upon

[2] Quæst. Jur. Publ. L. I. c. 9, § 4. Si medius sim, alteri non possum prodesse, ut alteri noceam.

the intercourse of neutrals with belligerents. It is not consistent with neutrality to convey to either belligerent arms or ammunition, or any warlike stores; for to furnish arms to the hands of one of two belligerent parties is to aid him directly in making war against his adversary. "Therefore," he goes on to say, "if we regard each of two belligerent Parties simply as a friend, we may carry on commerce with him, and send to him all articles of merchandise indiscriminately; but if we consider each of them to be the enemy of a friend, we must exclude from our commerce all those articles, from which harm may accrue to a friend in war[3]."

Views of Wolff and of Vattel.

§ 211. Wolff, having discussed the Right of every Nation to abstain by virtue of its Natural Liberty from taking part in a War which has broken out between other Nations, goes on to say, that Neutral Nations ought to perform towards each of the belligerent Parties the same good offices, which they are bound by the Law of Nations to perform in time of Peace, unless they are bound by an express Convention with one of the Parties to perform or to abstain from performing certain good offices, which may have some reference to War, in which case they are bound to perform or to abstain from performing such good offices equally to both the belligerent Parties. To the same purport Vattel[4], having defined Neutral Nations to be those which in time of War do not take any part in the contest, but remain common friends of both,

3 Non licet igitur alterutri advehere ex quibus in bello gerendo opus est, ut sunt tormenta, arma, et quorum præcipuus in bello usus, milites. And again, Optimo jure interdictum est, ne quid eorum hostibus subministremus, quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere. Quæst. Jur. Publ. Univ. L. I. c. 9.

4 Droit des Gens. L. III. c. 7. § 103, 104.

without favouring the arms of the one to the exclusion of the other, observes that so long as a Neutral Nation wishes securely to enjoy the advantages of her Neutrality, she must in all things show a strict impartiality towards the belligerent Parties. He then proceeds to consider in what consists this impartiality, which a neutral Nation ought to observe. "It solely relates to war and includes two articles. 1. To give no assistance where there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war. I do not say 'to give assistance equally,' but 'to give no assistance;' for it would be absurd that a State should at one and the same time assist two Nations at war with each other; and besides, it would be impossible to do it with equality. The same things, the like number of troops, the like quantity of arms, of stores, &c. furnished under different circumstances, are no longer equivalent succours. 2. In whatever does not relate to war, a neutral and impartial Nation must not refuse to one of the Parties on account of his present quarrel, what she grants to the other. This does not deprive her of the liberty to make the advantage of the State still serve as her rule of conduct in her negotiations, her friendly connections, and her commerce. When this reason induces her to give preferences in things which are ever at the disposal of the possessor, she only makes use of her right, and is not chargeable with partiality. But to refuse any of those things to one of the Parties purely because he is at war with the other, and because she wishes to favour the latter, would be departing from the line of strict neutrality. I have said that a neutral State ought to give no assistance to either of the Parties, when under no obligation to give it. This restriction is necessary. We

have already seen[5] that when a Sovereign furnishes the moderate succour due in virtue of a former defensive alliance, he does not become an associate in the war. He may therefore fulfil his engagement, and yet observe a strict neutrality. Of this Europe affords frequent instances."

Views of Martens.

§ 212. "Perfect Neutrality," says Martens[6], "consists, 1. in abstaining from all participation in the operations of a war; 2. in behaving impartially in regard to everything which may be useful or necessary to the belligerents in respect of the war, either by granting or refusing to the one Party what we have granted or refused to the other, or at least by continuing the same behaviour which we have maintained in time of peace. As long as a Nation satisfies these duties, she has a right to demand to be treated as a friend by each of two Belligerent Parties, and to enjoy the independence which the Law of Nature assures to her, and which she is not obliged to sacrifice to the interests of the Belligerent Parties. But the Natural Rights and Duties of Neutrality being susceptible of modifications, the duties to be performed in case of war, either on the part of a Belligerent Nation towards a Neutral, or on the part of a Neutral Nation towards a Belligerent, may be extended or restricted by Conventions. Hence there results what is termed a Conventional Neutrality, which may apply either to the whole of the dominions of a Power, or only to portions of them, such for instance as the Austrian Low Countries in 1733." Martens then proceeds to consider in detail the rights and duties of Neutrals under three heads: 1. the succours which may be furnished to the Belligerent Parties; 2. the conduct to be observed in

5 Droit des Gens, L. III. c. 6. § 101.

6 Précis du Droit des Gens, L. VIII. c. 7. § 306, 307.

regard to the territory of the Neutral Power; 3. Commerce. On the first two of these heads it may be observed that there is not much divergence either of theory amongst Jurists, or of practice amongst Statesmen in the present day. Thus a Nation may have engaged itself by Treaty to furnish limited succours to another Nation in case that its territory should be invaded by any third Nation; and in practice the fulfilment of such Treaty-engagements has been held to be not inconsistent with neutrality[7]. On the other hand the sacredness of Neutral territory is recognised in all Courts which hold cognisance of questions of Prize of War. It is on the third head of Commerce that differences of opinion are still found to prevail amongst Publicists, and that disputes in practice still arise between Nations, from the tendency of Belligerents to overlook the fact that the political duty of Nations, which are at peace with all other Nations, does not require them to restrain their Subjects from continuing their customary commerce by reason of war existing between other Nations[8].

Perfect Liberty of commerce within the territory of Neutral Powers.

§ 213. "That an enemy may come into the territory of a Neutral Power, and there purchase and thence remove any article whatsoever, even instruments of war, is a Law of Nations, long and universally established." Such is the language of the Attorney General of the United States in his Report addressed on 20 January 1796[9] to the Secretary of State. Vattel[10] to the same purport writes, "Further

7 Vattel, L. III. c. 6. § 9, supports this view and combats with great earnestness the opposite view of Wolff. § 736.

8 Vattel, L. III. c. 7. § 111. De Tastet *v.* Taylor, 4 Taunton, p. 238. Bell *v.* Reid, 1 Maule and Selwyn, p. 727.

9 Opinions of the Attorneys General of the United States, Tom. I. p. 62.

10 Droit des Gens, L. III. c. 7. § 110.

it may be affirmed on the same principles, that if a Nation trades in arms, timber for ship-building, vessels, and warlike stores, I cannot take it amiss that she sells such things to my enemy, provided she does not refuse to sell them to me also at a reasonable price. She carries on her trade without any desire to injure me; and by continuing it in the same manner as if I were not engaged in war, she gives me no just cause of complaint." Martens[11] in the same spirit, after observing that the positive Law of Nations has modified some of the principles of Natural Law as regards Commerce, says, that "it does not forbid neutral Powers to sell in their own markets all sorts of merchandise, even munitions of war, to individual purchasers who resort to them." Lampredi[12] likewise, in his Treatise on the Commerce of Neutrals in time of war, in which he has advocated the Rights of Neutral Nations with great moderation and in a very philosophical spirit, observes that "a State cannot be required to renounce any of its Natural Rights against its free will, and that consequently it is only by an express or tacit Convention that it can be debarred from the Right of selling within its own territory its own productions to whom it pleases, provided that without exception of persons it sells equally to all parties, although they may be the enemies of one another, and shows no favour to one Belligerent in preference to the other." He further proceeds to observe, that "the sale of merchandise within the territory of a Neutral Nation has always been considered to be as free and unassailable as the Sovereignty itself of the Nation." This truth, known by all writers and confirmed by the practice of all Nations, has been developed by us

[11] Précis du Droit des Gens, § 318.

[12] Du Commerce des Neutres, § 5. p. 53. ed. 1802.

in our *Cours du Droit Public*, where we have established in substance, that in virtue of the Conventional Law of Europe Neutrals cannot furnish with impunity to Belligerent Nations articles of direct use in war, remarking however that by the word *furnish* (fournir) we mean *carry* (porter), and that the sale of the same merchandise within the territory of the Neutral to any purchaser who may p esent himself, is allowable to Neutral Nations, who in so acting do nothing contrary to Natural Right, or hurtful to any one, so long as they do not show partiality and favour to any of the belligerents in their commercial operations.

Distinction between trade on the High Seas and trade within the territory of a Neutral Power.

§ 214. It is important to bear in mind the great distinction which exists between trade which is carried on within the territory of a Neutral Power, and trade which is carried on within the territory of a Belligerent Power, or upon the High Seas. By the Law of Nations the Sovereignty of an Independent State over its own territory is absolute, and its Laws are binding upon all persons who come within its territory. Such persons become its Subjects *de facto*, whilst they are within its territorial jurisdiction, and it matters not whether the mutual relations of the political communities themselves, of which they may happen to be natural born Subjects, be those of peace or war. The merchant who enters the territory of a Neutral Power is entitled to find an Asylum there from which the arts of peace have not taken their departure, and where amongst those arts of peace, commerce may still be cultivated without fear of any Belligerent wresting merchandise by force of arms from its owner. The Rights of War have no place where the Sovereignty of a Neutral Power prevails; but if the Merchant ventures beyond the confines of Neutral territory, the case is different. Whatever

be his merchandise, if he is an enemy of the Belligerent Power, he is at the mercy of the Belligerent Power whilst he is on the High Seas. If, on the other hand, the Merchant is a Subject of a Neutral Power, the Sovereignty of his Nation does not attend upon him on the High Seas to protect his property from the just application to it of the Rights of War on the part of a belligerent Power.

It is not disputed by any Jurist of note that a belligerent Power may interdict all commerce with the markets of an Enemy by establishing a blockade of his ports; and may confiscate *jure belli* the ship and cargo of any Merchant who, whatever may be his national character, with knowledge of the blockade destines his cargo for a blockaded port. Lord Stowell has pointed out that this practice of confiscation is founded on the necessity of applying a penalty, which will prevent future transgression[13]. This Right of War may be exercised in every place where it does not conflict with the Sovereign Right of a Neutral Nation; and accordingly a Belligerent cruiser may capture a merchant vessel, which is destined to a blockaded port, immediately after she has quitted the Jurisdictional waters of a Neutral Power. So likewise it is not an overstraining of Belligerent Right, if a Belligerent cruiser should capture a merchant vessel, which is laden with munitions of war, destined to an enemy's port, although the port should not be under blockade, as soon as she has begun to navigate the High Seas. The Right of Commerce, although it be a Right of Natural Society, is not a paramount Right; and wherever the Right of Commerce comes into evident conflict with the Right of Self-Defence, which is a paramount Right, the exercise of the former must be subject to

[13] The Lisette, 6 Ch. Rob. p. 387.

restriction. In olden times indeed belligerent Powers claimed an arbitrary Right to prohibit by Proclamation all trade with the ports of the Enemy, and were accustomed to treat, as adherents of the Enemy, all Merchants who should contravene their Proclamation. The Usage of Nations however has intervened in this matter, and shifted the subject from its foundations of arbitrary Right; and by that Usage a Belligerent Power can only interfere with the commerce of Merchants, who are the Subjects of Neutral Powers, when their commerce either supplies the enemy directly with munitions of war, or will defeat the immediate operations of a siege or blockade, whereby the Belligerent seeks to reduce his enemy to terms by cutting off all his supplies.

Exceptional *status* of the Merchant on the High Seas.

§ 215. That an individual citizen of a Neutral State should be liable to be treated as an adherent of a Belligerent Power, whilst the Nation itself, of which he is a member, maintains neutrality, presents no difficulty. War is a great trial of Right, in which all mankind are entitled to take part, if their sense of justice prompts them to side with either party, or their sense of danger compels them to array themselves against either party. On the other hand, a Belligerent is entitled to enlist in his cause all who are disposed to aid him in the prosecution of his Right by force. Whether those who unite with him to support his contention are bound by a tacit or express contract to give him aid, or voluntarily join their force to his force in consideration of fixed pay or contingent booty, is immaterial. All, who take part in the war, are Belligerents; all, who stand aloof from the contention of the Belligerents, are neutral. A Nation, in the sense in which it is the subject of Law in relation to other Nations, is not a Race of men scattered over the face of the globe

according as pleasure or interest may direct the movements of individuals, but it is an Independent Community of men living under a common Government within a given territory, and of which the Governing Power represents the Community in all its relations with other similar Communities. Every member of such a Community, as long as he remains within the territory of the Nation, is subject to the Laws of the Community, and partakes of its independence in the face of other Nations, and the Government is responsible for his conduct towards all persons within its territory. But if an individual member of such a Community quits the territory of the Community, the Community ceases to be responsible for his acts, for he has passed out of the dominion of its laws; and if he enters the territory of another Nation, he becomes *de facto* subject to its Government, and the Government of that Nation in its turn becomes responsible for his conduct towards all persons within its territory. On the other hand, as no Nation has jurisdiction over the High Seas, no Nation is charged with responsibility for the acts of any individuals upon the High Seas *ratione loci*, and it can only be responsible for the acts of individuals *ratione personarum*, where the Government of the Nation has authorised them to act in its name. "Nostri juris interpretes rectius et explicatius docent factum esse publicum quando deliberatum a legitime congregata universitate est[14]." Hence arises a fundamental distinction between the character of a Public Ship and of a Private Ship. The Commander of a Public Ship has a Commission from the Government of the Nation under whose flag the ship is navigated, and accordingly the Govern-

[14] Albericus Gentilis, De Jure Bell. et Pac. L. I. c. 21.

ment of the Nation is responsible for the conduct of the Commander of a Public Ship *ratione personæ* wherever that ship may be. The Sovereignty of a Nation is present in the person of the Commander of a Public Ship on the High Seas, just as it is present in the person of the Commander of an army marching through a foreign country, or in the person of a political Envoy who is the bearer of credentials to a foreign Power. But the Sovereignty of a Nation is not present in the person of the master of a Private Ship on the High Seas any more than it is present in the person of a traveller who is sojourning in foreign lands, and who is not directly clothed by any act of his Government with a representative character. Accordingly, as the traveller becomes subject to the Laws of the State wherein he is sojourning, without any conflict thereby arising between the Sovereignty of the State, of which he is a natural born subject, and the Sovereignty of the State, wherein he is sojourning, so the merchant on the High Seas may become subject to the Common Law of the Highway of Nations without any prejudice thereby resulting to the Sovereignty of the Nation, of which he is a citizen. Accordingly, after a Private Ship has quitted the Jurisdictional waters of the State, of which its master and crew are natural born Subjects, they will become amenable to a law which does not bind in any way their fellow Subjects, who remain within the territory of their Nation. Such is in fact the normal state of things in time of peace. For instance, if the master and crew of a ship should attack another ship within the Jurisdictional waters of a State, they are amenable to the Territorial Law of that State; but if they should commit a similar act on the High Seas, they are amenable to a Common Law, which all Nations

may administer, and they may be seized and justified by any Nation whatsoever for a breach of the Common Law of Nations, without the slightest encroachment upon the independence of the Nation, whose natural born Subjects they may be. There is therefore no *a priori* difficulty in supposing that in time of war the citizens of a Neutral State when they are on the High Seas may be amenable to a different Law from that which exclusively prevails within the territory of their State, and that belligerent Nations may enforce the Rights of War against them without encroaching upon the Independence of their Nation. What those Rights of War may be must be gathered from reason and usage. "Jus Gentium Commune in hanc rem non aliunde licet discere, quam ex Ratione et Usu[15]. Reason, to paraphrase the language of Bynkershoek, dictates that if I wish to remain equally the friend of two parties who are enemies, I must prefer neither of them to the other in any matter which has relation to their quarrel. Usage, on the other hand, as may be inferred from an almost perpetual Custom of making treaties and proclamations (*ex perpetua quodammodo paciscendi edicendique consuetudine*) enjoins that a party who wishes to remain the friend of both Belligerents should not *carry* to either of them arms or other articles of warlike use, and that if such merchandise be taken on its voyage to an enemy's country, it may be confiscated; that with this exception commerce should be free, and all other merchandise be carried with impunity to the enemy.

The Political Duties of Neutral Nations towards Belligerent Nations.

§ 216. A Nation, in its character of a Political Community inhabiting a given territory, has no Political duties towards Belligerent Nations different

[15] Bynkershoek, Quæst. Jur. Publ. L. I. c. 10.

in kind from its duties towards Nations which are at peace with one another. Its duties towards Belligerents may however be said to differ *in degree* from those duties, which it owes to Nations which are at peace with one another. For example, a Neutral Nation is not bound to perform any other good offices towards Belligerent Nations, than it is accustomed to perform towards Nations which are at peace with one another; but if it performs any good offices towards one of two Belligerent Nations, it is bound in the same degree to perform them towards the other Belligerent Nation. A Nation is at liberty to show more or less favour, as it sees fit, to a Nation which is at peace with all other Nations; but it cannot consistently with a state of Neutrality refuse to one of two Belligerent Nations any good offices, which it has accorded to its adversary. The Political duty therefore which is imposed upon a Nation by a state of Neutrality consists in its obligation to exercise its Rights of Sovereignty with impartiality towards every Belligerent Nation, and this Political duty is coextensive with the Sovereignty of a Nation. It follows that the limits of the Political duties of a Neutral Nation towards Belligerent Nations are identical with the limits of its Sovereignty; and if any individual citizen of a Neutral State should be guilty of unneutral conduct beyond the limits of its Sovereignty, such conduct cannot be charged upon the Government of the State as a departure from Neutrality. Forfeiture of the goods and ship is the penalty annexed to such acts by the Law of the High Seas in time of War, and if this were not the case it would be in the power of individual merchants to involve a Neutral Nation in war against its will.

§ 217. As every obligation under the Common

Inviolability of the territory of a Neutral Nation.

Law of Nations implies a corresponding Right, the obligation of a Neutral Nation to exercise its Right of Sovereignty with impartiality towards either of two Belligerent Parties, implies a Right to enforce its Sovereignty with impartiality against either of them. Accordingly the territory of a Neutral Nation can never be rightfully made the battle-field for settling the disputes of Belligerent Nations, for such a result would be a violation of the Independence of the Neutral Nation, if it were brought about against its will. On the other hand, if the Government of a Nation were to permit a Belligerent to take advantage of its territory for the purpose of attacking his adversary, the Nation itself would forfeit its character of Neutrality. The Rights of a Belligerent Nation, as such, which are founded upon a state of War existing between it and another Nation, can only be exercised by it within its own territory, where its Rights of Empire (*imperium*) are always supreme, or within the territory of its Enemy, whose Empire it is entitled by its Declaration of War to supersede by force, or on the High Seas, or on land which is not under the Empire of any Nation. "Jure belli," says Bynkershoek[16], "adversus hostem duntaxat utimur in nostro, hostis, aut nullius territorio. Sed in territorio utriusque amici qui hostem agit, agit et adversus principem, qui ibi imperat, et omnem vim a quocunque factam legibus coercet." So Grotius[17] says of Enemies, "Interfici ergo possunt impune in solo proprio, in solo hostili, in solo nullius, in mari. In territorio autem pacato, quod eos interficere aut violare non licet, id jus non ex ipsorum venit persona, sed ex jure ejus qui imperium habet." All writers accordingly agree that a Neutral Nation

[16] Quæst. Jur. Publ. Univ. L. I. c. 8.

[17] De Jure Belli et Pacis, L. III. c. 4. § 8, 2.

may prohibit a Belligerent from attacking his Enemy whilst he is within the territory of the Neutral Nation. There is not however the same unanimity on the question, whether if the contest shall have been begun on a lawful battle-field, and either of the Belligerent parties should seek to avail himself of the shelter of Neutral Territory, the adverse Belligerent may continue his pursuit, *dum fervet opus*, and capture his antagonist, although he should be at the moment of capture within the territory of a Neutral State. Bynkershoek intimates an opinion of his own in the affirmative, but with many qualifications, and as a view which he did not find to have been countenanced by any other writers[18]. Casaregis, in one of his Discourses[19], advocates a similar view; but he is not consistent in such advocacy, as he maintains a contrary opinion in a later Discourse[20]. D'Abreu, Vattel, Emérigon, Lampredi, Martens, Klüber, and all English and American writers of note, agree in maintaining the doctrine, that if a Belligerent is successful in effecting his retreat, during a contest with his adversary, into Neutral Territory, the continuance of the contest on the part of his adversary will be a violation of the Sovereignty of the Neutral Power. The Prize Courts of Great Britain, and of the United States, have upheld this view of the Law of Nations by repeated decisions[21], and have invariably ordered the captors to make restitution of every vessel which may have been captured within the Territory of a Neutral Power, if that Power has

[18] Quæst. Jur. Publ. Univ. L. I. c. 8. The Anna, 5 Ch. Rob. p. 385. *d.*

[19] Casaregis de Commercio, Discorso XXIV. No. 2.

[20] Ibid. Discorso CLXXIV. No. 11.

[21] The Anna, 5 Ch. Rob. p. 373. J. F. Soult *v.* L'Africaine. Bee's Reports, p. 204. The Grange. Opinions of the Attorneys General of the United States, Tom. I. p. 15.

itself demanded its restitution[22]. But it is the privilege of the Neutral Power alone to vindicate the outrage against its Empire. "A capture," says Mr. Justice Story, "made within Neutral Waters is, as between Enemies, deemed to all intents and purposes rightful: it is only by the Neutral Sovereign that its legal validity can be called in question, and as to him, and him only, is it to be considered void. The Enemy has no rights whatever, and if the Neutral Sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities, and the doctrine rests on well established principles of Public Law[23].

The passage of Belligerents through Neutral Territory.

§ 218. A Neutral Nation has the same absolute Right of Sovereignty within its own Territory in respect of Belligerent Nations as it has in respect of Nations which are at peace with one another. It may accordingly grant a free passage through its Territory to the armed troops of a Belligerent Power without compromising its neutrality, if it is prepared to grant a free passage similarly to the armed troops of the other Belligerent[24]. "An innocent passage," says Vattel[25], "is due to all Nations with whom a State is at peace, and this duty extends to troops as well as to individuals. But it rests with the Sovereign of the Country to judge whether the passage be innocent, and it is very difficult for the passage of an army to be entirely so." "It is to

[22] The Eliza Ann, 1 Dodson, p. 244.

[23] The Anne, 3 Wheaton, p. 446. The doctrine of the British Courts of Prize on this subject is identical with that of the American Courts.

[24] Qui transitum cum exercitu per terras suus petenti concedit, ei, contra quem eodem opus habet, injuriam minime facit. Wolff, § 689.

[25] L. III. c. 7. § 119.

be observed," says Lord Stowell[26], that the right of refusal of passage, even upon land, is supposed to depend more on the inconvenience falling on the Neutral State, than on any injustice committed to the third party, who is to be affected by the permission. Grotius[27] and Vattel both agree that it is no ground of complaint, nor cause of war against the intermediate Neutral State, if it grants a passage to the troops of a Belligerent, though inconvenience may thereby ensue to the State beyond; the ground of the right of refusal being the inconvenience that such passage may bring with it to the Neutral State itself[28]. Since therefore the passage of troops and especially of an army is by no means a matter of indifference, he who desires to march his troops through Neutral Territory must apply for the Sovereign's permission[29]. To enter his Territory without his consent, is a violation of his right of Empire, by virtue of which his Territory is not to be employed for any use whatever, without his express or tacit permission. Now a tacit permission for the entrance of a body of troops is not to be presumed, since their entrance may be productive of the most serious consequences. If the Neutral Sovereign has good reason for refusing a passage to them, he is not obliged to grant it, the passage in that case being no longer innocent[30]. With regard however to the passage of the armed vessels of a belligerent Power over what is sometimes termed the Maritime Territory of a Neutral Nation, that is, over those portions of the sea which

[26] The Twee Gebroeders, 3 Ch. Rob. p. 353.

[27] De Jure Belli et Pace, L. II. c. 2. § 13.

[28] Kent's Commentaries on American Law, Tom I. p. 119.

[29] Qui cum exercitu per terras alterius Gentis iter facere vult, transitum petere debit. Wolff, Jus Gent. § 688.

[30] Droit des Gens. L. III. c. 7. § 119–121.

flow within the distance of three miles from its coast, and over which it exercises a jurisdiction of its own concurrently with the common Maritime jurisdiction of Nations, the case is different[31]. A Nation may forbid the armed fleets of a belligerent Power to enter its ports, harbours, and estuaries, or any of its internal waters; but it cannot rightfully forbid them to pass over the seas which wash its coasts, although it has a qualified jurisdiction over such seas, inasmuch as the passage of ships over such external waters, whether such ships are armed for war or fitted out for commerce, is equally innocent as regards the Nation whose coasts are washed by such waters, for it does not sustain any damage by the passage of them. "It is an observation," says Lord Stowell, "that the passage of ships over territorial portions of the sea, or external water, is a thing less guarded than the passage of armies over land, and for obvious reasons. An army in the strictest state of discipline can hardly pass into a country without the greatest inconvenience to the inhabitants: roads are broken up; the price of provisions is raised; the sick are quartered on individuals, and a general uneasiness and terror is excited; but the passage of two or three vessels, or of a fleet over external waters, may be neither felt nor perceived. For this reason the act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of Territory belonging to a Neutral State: permission is not usually required; such waters are considered as the common thoroughfare of Nations, though they may

[31] Grotius holds that a Neutral State may refuse a passage to a Belligerent army, if it is making an unjust war, or brings with it any enemies of the Neutral State, otherwise the right of the Neutral State will be limited to regulating the passage of the Belligerent troops, and requiring hostages for their good conduct.

be so far Territory as that any actual exercise of hostilities is prohibited therein[32].

Hospitality to belligerent ships discretional on the part of Neutral Powers.

§ 219. A Neutral State, by virtue of its Right of Empire over everything within its Territory, may impose such conditions as it pleases upon belligerent vessels which enter its Territory[33]. The circumstance that a vessel belongs to the citizen or subject of a Belligerent State will not disentitle its master and crew from claiming the ordinary rights of hospitality from a Neutral Nation in case of immediate danger from the perils of the sea, or pressing distress owing to sickness or want of water or provisions. Merchant ships are received in general into the ports of Neutral States without any distinction between those which are the property of the Subjects of Belligerent Powers and those which are the property of the Subjects of Neutral Powers; but with regard to armed ships, of which the Captain has a Commission of War from a Belligerent Power, and particularly with regard to private ships sailing under Letters of Marque, the hospitality of Neutral States is in practice restricted for the most part to supplying them with articles of pressing necessity. Hospitality to such an extent may be regarded as a common duty of humanity; but it is an act of Comity within the discretion of the Neutral State to allow the armed ship of a Belligerent Power to have free communication with the land (*libre pratique*) or to permit its crew to disembark on its shores. Further, it is competent for the Neutral Power without any disregard of the duties of humanity to require any armed Belligerent ship to continue its voyage as soon as its pressing necessities have been satisfied. It is by no means a rare event for a Neutral Power to notify publicly the

[32] The Twee Gebroeders, 3 Ch. Rob. p. 352.

[33] Bynkershoek, Quæst. Jur. Publ. L. I. c. 8.

conditions under which the armed ships of Belligerent Powers will be admitted into its ports, and to interdict them from entering certain of its ports, as for instance its military ports. Thus in the war between the three Allied Powers and Russia in 1854, the Swedish and Norwegian Government issued a Circular Notice to the effect that, whilst it conceded to Belligerent ships of war and of commerce permission to enter its ports, it reserved to itself the faculty of interdicting to Belligerent ships of war an entrance into certain ports: to wit, the port of Stockholm, inside of the fortress of Maxholm; the port of Christiania inside of the port of Kaholm; the interior basin of the military port of Horten; the ports of Carlsten and of Carlscrona within the fortifications; and the port of Slito in Gothland inside the batteries of Eneholm. In the exercise of an analogous right of Empire over her own Territory Denmark issued a circular note in the same spirit on 2 April 1854, reserving to herself the right of interdicting Belligerent ships of war and transport ships from entering the port of Christiansoe[34].

Neutral Rights of police over Belligerent vessels of war in Neutral waters.

§ 220. A Neutral State, in permitting Belligerent ships of war to enter within her territorial waters, is bound, if it be within its power, to render their sojourn in those waters safe to them, equally as in granting a passage to their troops over land. She is under an obligation of good faith to render their passage through her territory safe, as far as depends upon her[35]; otherwise to permit the vessels of a Belligerent to enter within her ports or harbours would be to ensnare them[36]. Accordingly, it is the duty of

34 Circular of the Danish Minister of Foreign Affairs, of 20 April 1854, in Sammlung Officieller Actentücke in Bezug auf Schiffahrt und Handel in Kriegszeiten. Hamburg, 1854.

35 Transeuntibus transitus præstandus est tutus. Wolff, § 704.

36 Vattel, L. III. c. 7. § 131.

a Neutral State not to permit a Belligerent vessel of war, which she has admitted into her internal waters, to be attacked by an Enemy-vessel of war which may subsequently enter them, and at the same time to prevent the vessel which has first arrived from availing itself of the advantage of its position to attack the last comer. Further, it is competent for a Neutral State, by virtue of its Right of Sovereignty over every person and thing which is within its territory, to detain a Belligerent vessel of war which has entered into any of its ports subsequently to another vessel which belongs to an Enemy, so as to secure that the latter shall not suffer prejudice from having entered into the port of a Neutral Power. A practice in this matter has become established amongst the European Powers to require every Belligerent vessel of war to allow an interval of twenty-four hours at least to elapse before it can sail out of a neutral port in pursuit of an Enemy vessel which has quitted the port since its arrival; and this practice has been adopted, as a rule of the Law of Nations, by the States of the American Continent[37]. The rule has further been incorporated into the provisions of various Treaties which regulate the intercourse of the Christian Nations of Europe and America with the Mahommedan Powers of Africa[38]. A striking example[39] of the manner, in which this rule is accustomed to be enforced, occurred in the month of December 1759, when a British fleet had entered the port of Cadiz, whilst a French vessel of

37 Instructions to the Collectors of Customs, 4 Aug. 1793. Jefferson's Letters to M. Genet, 8 and 17 June 1793. Kent's Commentaries, I. p. 123.

38 Treaty between the United States and Morocco, 25 Jan. 1787. Martens, Récueil, IV. p. 247. U. S. and Tripoli, 4 Nov. 1796. Id. p. 299. U. S. and Tunis, 28 Aug. 1797. Id. VI. p. 405.

39 Ortolan, Règles Internationales, Tom. II. p. 249.

war, the Fantasque, was lying at anchor. The Governor of Cadiz immediately sent a requisition to the British Admiral to allow the Captain of the French vessel the option of sailing out at least twenty-four hours before the departure of the British fleet; and Admiral Broderick at once acceded to the requisition of the Governor. An instance of this rule having been enforced by the King of Spain in the previous century is furnished by a Royal Ordinance of 18 June 1653, issued on the occasion of hostilities between the English and Dutch[40].

Azuni[41] has set forth at length the regulations of Police, which Neutral Nations have from time to time thought fit to enforce against Belligerent vessels of war, which have taken advantage of the Asylum of Neutral waters.

(1.) Privateers and all vessels of war ought to observe peace and perfect tranquillity towards all parties, and particularly towards the subjects and ships of their enemies, even if the latter should be privateers or vessels of war.

(2.) Privateers and vessels of war are forbidden to increase the number of their crew by receiving on board any seaman of any Nation whatever, without excepting even their fellow citizens, who may have been enrolled for military service.

(3.) They may not augment the number or calibre of their guns, nor the quantity of their ammunition.

(4.) They may not keep sentinel in the port, nor seek to procure information about the vessels which are likely to touch there. In case that they descry

[40] This Ordinance is given *in extenso* in D'Abreu, Tratado Juridico-Politico sobre Pressas de Mer, impressa en Cadiz, 1746, c. 4. p. 62. A Règlement of the Republic of Genoa on this subject, which was issued in 1779, will be found in Martens, Récueil, Tom. III. p. 67.

[41] Droit Maritime de l'Europe, Tom. I. c. 5. p. 409.

any of them, they are not to sail out of port for the purpose of attacking them: if they should do so, they may be fired at from the batteries and ships of war in the port, and compelled to return.

(5.) They may not set sail after an enemy's ship has tripped her anchor: they ought to allow at least an interval of twenty-four hours to elapse between its departure and their own. After this interval has elapsed, if the enemy-ship is still in sight of the port, a belligerent vessel ought to delay its departure until the other vessel is out of sight and the direction of its course cannot be known.

(6.) They may not place themselves in ambuscade in bays or gulfs, nor hide themselves behind promontories, or small islands which are dependencies of the neutral mainland, in order to watch for and give chase to enemy-vessels. They ought not to trouble in any manner the approach of vessels, of whatever Nation they may be, to the ports or coasts of a Neutral Nation.

(7.) They may not, during all the time that they are within the ports or territorial seas of a Neutral Nation, employ force or stratagem to recover prizes which may be in the power of an enemy, or to deliver their fellow citizens who may be their prisoners.

(8.) They may not proceed to the sale or redemption of prizes made by them, before a legal judgment has established their validity.

The foregoing rules may be traced through a long series of Ordinances, which have been published from time to time, as occasion called for them, by various Neutral Powers. It is not however incumbent on a Neutral Power to enforce the police of its own Territory against the Subjects of a Belligerent Power, further than may be requisite to afford protection to

the Subjects of the adverse Belligerent, whilst they are under the Sovereignty of the Neutral Power.

Right of a Neutral Power to exclude Privateers and all Prizes of war from its ports.

§ 221. It is by no means unusual for a Neutral State to refuse to the Privateers of a Belligerent Power all access to its internal waters. Thus during the war between the Allied Powers and Russia in 1854, the King of Sweden and Norway issued an Ordinance on 24 March 1854, whereby it was provided that no foreign Privateer should be allowed to enter any Swedish port or to sojourn in its roadsteads. Such prohibitions however are not in practice interpreted so strictly, as to deny to Privateers a refuge within Neutral waters from the attack of an enemy, or from perils of the sea. Thus even in cases where a State has entered into Treaty-engagements[42] to exclude Privateers belonging to the enemies of the other contracting Party from all commerce with its Subjects, an exception is usually made in favour of the duties of humanity being shown to such privateers, if they should be in distress. It is also perfectly competent for a Neutral State to prohibit by Proclamation or otherwise the Public vessels of Belligerent Powers, as well as Privateers, from bringing their prizes into its ports. In the silence however of a Neutral State on this subject, a Belligerent Power is entitled to presume that its armed vessels may freely enter the ports of the Neutral State with their prizes and prisoners, and that they will be at liberty to depart with them unmolested.

There appears to have been a time when Jurists were disposed to maintain, on the theory of the detention and custody of prisoners of war being a

[42] Treaty of 6 Feb. 1778 between the United States of America and France. Martens, Récueil, II. p. 597. Treaty of 19 Nov. 1794 between the United States of America and Great Britain. Ibid. V. p. 682.

continuation of hostilities, that such prisoners were entitled to be set free, if they were brought within Neutral waters, although they were not landed on the shore of the Neutral State. Bynkershoek[43] however has pointed out, that in such a case, when the capture is completed, a state of lawful possession is established, which a third Power cannot disturb consistently with impartiality. There can be no doubt that according to the usage of Nations, if an armed ship under the flag of a Belligerent Power has been admitted into the harbour of a Neutral Power without notice of any intention on the part of that Power to interfere with the custody of its prizes or its prisoners, it would be inconsistent with Neutrality for the Government of the Neutral Power to set those prizes or prisoners at liberty. But if, on the other hand, the prisoners should have escaped to land without any interference on the part of the Neutral Power, they will have escaped out of the possession of the Belligerent Power, and the Neutral Power will equally be called upon to maintain their state of freedom, as it was before called upon to maintain their state of captivity.

A question of this kind arose in the course of the war between the Allied Powers and Russia in 1854, on occasion of a British vessel of war entering the Bay of San Francisco, in the State of California, in company with a Russian prize, the Sitka, in charge of a British prize-crew. On 25 Nov. 1854, a petition was presented to a Court of Municipal Law at San Francisco on behalf of two Russian seamen, alleging

[43] Apud eos, qui utrinque simpliciter amici sunt, status rerum hominumve nostrorum non mutatur, cum nulla sit mutandi causa. Unde miror Gentilem aliosque existimasse, postliminio reverti, quæcunque in non hostis imperium delata sunt, et quod ei consequens est, captivos in territorium amici deductos, fieri liberos. Quæst. Jur. Publ. Univ. L. I. c. 15.

that they were unlawfully detained on board the Sitka by the prize-master and crew, and praying for a writ of *Habeas Corpus*, directed to such master and crew. The Court thereupon granted the writ, which was duly served upon the prize-master, who thereupon immediately got the Sitka under weigh, and sailed out of the jurisdiction of the State of California. Upon the question being referred to the Federal Government, the Attorney General of the United States reported, that the conduct of the prize-master constituted no just cause of complaint on the part of the United States under the Law of Nations, or under any Treaty between the United States and a Foreign Power[44].

Belligerent privilege of Asylum in Neutral Waters.

§ 222. The following propositions contain the views of the Government of the United States of America as to the privilege of Asylum within Neutral Waters. They were issued in 1855 and accord with the practice of the European Powers :—

1. Belligerent ships of war, privateers, and the prizes of either are entitled on the score of humanity to temporary refuge in Neutral Waters from casualties of the sea or war.

2. By the Law of Nations Belligerent ships of war, with their prizes, enjoy Asylum in Neutral ports for the purpose of obtaining supplies or undergoing repairs, according to the discretion of the Neutral Sovereign, who may refuse the Asylum absolutely, or grant it under such conditions of duration, place, and other circumstances, as he shall see fit, provided that he be strictly impartial in this respect towards all the Belligerent Powers.

3. When the Neutral State has not signified its determination to refuse the privilege of Asylum to

[44] Opinions of the Attorneys General of the United States, Tom. VII. p. 123.

Belligerent ships of war, privateers, or their prizes, either Belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations and limitations as the Neutral State may please to prescribe for its own security.

4. The United States have not by Treaty with any of the present Belligerents bound themselves to accord Asylum to either, but neither have the United States given notice that they will not do it, and of course our ports are open for lawful purposes to the ships of war of either Great Britain, France, Russia, Turkey, or Sardinia.

5. A foreign ship of war, or any prize of hers, in command of a public officer, possesses in the ports of the United States the right of extra-territoriality, and is not subject to the local jurisdiction.

6. A prisoner of war on board a foreign man-of-war, or her prize, cannot be released by Habeas Corpus issuing from Courts either of the United States or of a particular State.

7. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the Belligerent and the Neutral State.

Right of a Neutral State to allow Belligerent Powers to recruit troops within its Territory.

§ 223. It is competent for every Independent State to allow the agents of a Foreign Power to enlist persons within its Territory for its military or naval service, and such conduct will be consistent with Neutrality so long as a State does not permit any Belligerent Power to do so, and refuse the like permission to its adversary. It was the common practice of the European Powers in the fourteenth century to carry on their wars with the aid of foreign mercenaries; and it was not until the fifteenth century, that Treaties of Alliance were introduced amongst the European Powers, in which there were

stipulations, that each of the contracting Parties should restrain its Subjects from taking part against the other contracting Party, in case it should be involved in war with a third Power. Thus in the Treaty concluded in 1467[45] between Edward IV of England and Henry IV of Castile, it was agreed that neither Ally should allow his Subjects to engage in any war against the other; and in the Treaty concluded in 1270-1[46] between Henry VI of England and Louis XI of France, it was agreed that neither Monarch nor the Subjects of either should engage in hostilities, either for their own quarrels or for the quarrels of others. Similar stipulations occur in other Treaties of alliance during the fifteenth century, and in numerous Treaties of alliance concluded in the sixteenth century, to which England, France, Spain, and the Emperor, were respectively parties. It is a necessary inference from the provisions of these and other Treaties, that the Common Law of Europe at that time did not impose upon a Power, which was desirous to observe Neutrality, the duty of restraining its Subjects from individually taking part in a war between Foreign Nations, and that the foundation of such a duty, when it arose, was *alliance*, and not simple *neutrality*. Such also is the inference to be drawn from the provisions of the Treaty of Munster, concluded in the middle of the seventeenth century (1648) between France, the Emperor, and the Electors, Princes, and States of the Holy Roman Empire, whereby it was agreed "that none of the contracting Parties should under any title or pretext supply the enemies of the other Parties with arms, money, soldiers, or provisions, or receive the troops of any such enemies into their territory, or allow them to encamp

[45] Dumont, Corps. Diplom. Tom. III Part I. p. 589.
[46] Ibid. p. 601.

or permit them to pass through it," all of which acts are under the Common Law of Nations perfectly consistent with Neutrality. So far indeed was it from being regarded at any time by the Nations of Europe as inconsistent with the Neutrality of a State, that any of its natural born Subjects should serve under the standard of a Foreign Power in a war against another Foreign Power, that there are on record numerous Conventions concluded by France, Spain, the Holy See, and Naples respectively with the Helvetic Cantons, under which the latter have engaged themselves to furnish those Powers with a certain number of troops, or to allow those Powers to recruit a certain number of troops within their territory, and not to recall such troops whilst those Powers should be at war[47]. The employment of Swiss mercenaries has only been discontinued by Naples and the Holy See within a very recent period. Great Britain on the other hand had Conventions in the last century with various German Powers, and more particularly with the Landgrave of Hesse Cassel[48], under which she had German mercenaries in her pay, whom she employed in her foreign wars by the side of her native troops.

Views of the United States Government as to a Belligerent enlisting troops within Neutral Territory.

§ 224. The views of the Government of the United States as to the right of a Neutral Power to grant or refuse, as it sees fit, permission to a Belligerent Power to enlist troops of land or sea within its Territory are contained in a State Paper issued from the Attorney-General's office in the month of October 1855, on occasion of certain agents of the British Government enlisting soldiers within the Territory of the United States.

47 The Treaty between France and Switzerland of 1521, which was the model for numerous subsequent Treaties between the same Powers, will be found in Dumont, Corps. Diplom. Tom. IV. Part I. p. 333.

48 Martens, N. R. II. p. 422.

1. It is a settled principle of the Law of Nations, that no Belligerent can rightfully make use of the territory of a Neutral State for Belligerent purposes without the consent of the Neutral Government.

2. The undertaking of a Belligerent to enlist troops of land or sea in a Neutral State without the previous consent of the latter is a hostile attack on its National Sovereignty.

3. A Neutral State may, if it pleases, permit or grant to Belligerents the liberty to raise troops of land or sea within its Territory, but for the Neutral State to allow or concede the liberty to one Belligerent and not to all would be an act of manifest Belligerent partiality, and a palpable breach of Neutrality.

4. The United States constantly refuse this liberty to all Belligerents alike, with impartial justice, and that prohibition is made known to the world by a permanent Act of Congress.

5. Great Britain, in attempting, by the agency of her military and civil authorities in the British North American provinces, and her diplomatic and consular functionaries in the United States, to raise troops here, committed an act of usurpation against the Sovereign Rights of the United States.

6. All persons engaged in such undertaking to raise troops in the United States for the military service of Great Britain, whether citizens or foreigners, individuals or officers, except they be protected by diplomatic privilege, are indictable by Statute.

Right of a Neutral Power to prohibit the enlist-

§ 225. Bynkershoek[49] considers that the Common Law of Nations does not impose upon a Neutral State any obligation to prohibit the agents of a

49 Bynkershoek, Observationes Jur. Publ. L. I. c. 22.

Foreign Power, which is at war with another Foreign Power, from enlisting men within its Territory to serve in its army or navy, but that the Neutral State has the right, if it thinks fit, to prohibit all such raising of men for warlike purposes within its Territory, inasmuch as it has a paramount right to require the services of all persons within its Territory for the purposes of its own defence, if war should arise. It is accordingly the privilege of a Neutral State at all times, and not the privilege of a Belligerent Power arising out of a state of War, to determine whether it is fit that the Subjects of the Neutral State should be prohibited from quitting its Territory to take service under the standard of a Foreign Power. "As the right of levying soldiers," says Vattel[50], "belongs solely to the Nation or the Sovereign, no person must attempt to enlist soldiers in a foreign country without the permission of the Sovereign." Hence it is competent for the Government of a Neutral Nation, if it sees fit, to forbid by proclamation or other public notice the agents of any Foreign Power, in time of war equally as in time of peace, from recruiting men for its army or navy within its territory. Wolff[51] has correctly pointed out that it is an offence against the Supreme Majesty of a State for any individual to levy soldiers within its territory without its consent, and that if a stranger so acts, he will be amenable to punishment under the Territorial Law of the State. "Quoniam nemini in alieno territorio militem conscribere licet invito superiore, si quis legere audet, *jus Gentis* violat, ac ideo injuriam eidem facit, cumque injuria hæc crimen sit a peregrino commissum, peregrini autem in territorio alieno delinquentes juxta leges loci puniendi

ment of troops within its Territory.

[50] Droit des Gens, L. III. c. 11. § 15.
[51] Jus Gentium, § 754.

sint, si peregrinus in territorio alieno invito superiore militem legere audet, deprehensus puniri potest." To a similar effect the Supreme Court of the United States of America has held[52] that a Neutral Nation, may, if so disposed, without any breach of her Neutral character, grant permission to both Belligerents to equip their vessels of war within her territory. But without such permission the Subjects of such Belligerent Powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such Neutral Nation. Such unauthorised acts violate her Sovereignty and her Rights as a Neutral. All captures made by means of such equipments are illegal in relation to such Nation, and it is competent to her Courts to punish the offenders, and in case the prizes taken by them are brought *infra præsidia*, to order them to be restored.

[52] Brig Alerta *v.* Blas Moran, 9 Cranch, p. 365.

CHAPTER XII.

ON THE RIGHTS AND DUTIES OF NEUTRAL POWERS, CONTINUED.

Trade within the Territory of a Neutral State—Purchase and sale of Ships by the Subjects of Neutral Powers—Sale of Ships of War by a Neutral Power—Modified Neutrality under Treaty-Engagements—Non-interference with trade consistent with the Neutrality of a State—The Policy of the United States of America, as a Neutral Power, to interdict certain branches of trade—Trade, unless interdicted, not a violation of the Sovereignty of a Neutral State—Jurisdiction over Captures in Neutral waters exercised by the Neutral Power—Ancient jurisdiction exercised by Neutral Powers in matters of Prize—Neutral Courts do not entertain the question of Damages—A Neutral Power may claim a vessel, captured in violation of its Territory, before a Belligerent Prize Court—Neutral Powers do not interpose their jurisdiction in cases of Rescue—Conflict of jurisdiction between a Neutral Admiralty Court and a Belligerent Prize Court—Duties of a Neutral Power in cases of Civil War—Belligerent Right of Capture reconcilable with the Independence of Neutral Powers.

Trade within the Territory of a Neutral State.

§ 226. Merchants, who are the subjects of Foreign Powers, when they seek to exercise commerce within the Territory of an Independent State, are subject to the absolute Sovereignty of that State, unless their commerce should be carried on under Treaty-engagements of a special character between the Sovereign to whom they owe Natural allegiance, and the Sovereign in whose ports they seek to exercise commerce.

Every Independent State is accordingly entitled to make laws for the regulation of the trade of foreign merchants in its ports, and it is competent for it to allow or to forbid to foreign merchants all trade in certain articles within its Territory. This absolute right of every Independent State to regulate the commerce of foreign merchants, who frequent its ports, is not affected by the circumstance that other Nations are at war with one another, further than that, if it wishes to observe a state of Neutrality between the Belligerent Nations, it must allow or forbid equally the Subjects of either Belligerent Nation to trade within its Territory; and that if it does allow the subjects of either Belligerent Power to trade in its ports, it is essential to the maintenance of its character, as a friendly State, to protect them in their trade. It is immaterial for the purposes of Rightful commerce within the Territory of a Neutral State, what may be the nature of the articles in which merchants seek to trade, provided they are not prohibited as objects of commerce by its Laws. Whether they are weapons which are suitable for the purposes of the chase or for the purposes of war; whether they are ships which are suited to carry cargo or to carry guns, is perfectly immaterial, if commerce in such articles is part of the customary trade within the ports of a Neutral State. Vattel considers the commerce of arms and ships to be no exception to the general commerce which every Power may permit to be carried on within its Territory[1], consistently with a State of Neutrality. "If a Nation," by which Vattel means the domiciled Subjects of a Nation, "trades in arms, timber for shipbuilding, ships, and warlike stores, I cannot take it

[1] L. III. c. 7. § 110.

amiss, that it sells such things to my enemy, provided it does not refuse to sell them to me also at a reasonable price. It carries on its trade without any design to injure me, and by continuing it in the same manner, as if I were not engaged in war, it gives me no just cause of complaint. In what I have said above, it is supposed that my enemy goes himself to the Neutral country to make his purchases. Let us discuss another case, *that of Neutral Nations resorting to my enemy's country for commercial purposes.* It is certain that as they have no part in my quarrel, they are under no obligation to renounce their commerce for the sake of avoiding to supply my enemy with the means of carrying on the war against me. Should they affect to refuse selling me a single article, while at the same time they take pains to convey an abundant supply to my enemy, with an evident intention to favour him, such partial conduct would exclude them from the Neutrality which they enjoyed. But if they only continue their *customary trade*, they do not thereby declare themselves against my interest; they only exercise a right which they are under no obligation of sacrificing to me[2]." Accordingly a Neutral Power does nothing incompatible with Neutrality in allowing its Subjects to carry any articles whatsoever of commerce to markets within the Territory of a belligerent Power, nor is it required by the Common Law of Nations to exercise its Right of Sovereignty over strangers who frequent its markets, in order to prevent the exportation of any articles which they may have purchased in its markets. On the contrary, although it may be competent for an Independent State to deny to all Na-

[2] Cf. Tastet *v.* Taylor, 4 Taunton, 238. Bell *v.* Reid, 1 Maule and Selwyn, p. 727.

tions the liberty of carrying on trade in a particular article of merchandise within its Territory, if the motive of such denial should be to impede the military operations of one of the belligerent Powers, and to favour the other, it is manifest that such conduct would be a breach of Neutrality[3].

Purchase and Sale of Ships by the Subjects of Neutral Powers.

§ 227. That there is nothing in the Law of Nations which requires a Neutral Power to prohibit its Subjects from selling armed vessels to a Belligerent, was very carefully laid down by Mr. Justice Story, in delivering the judgment of the Supreme Court of the United States on the subject of the equipment of an armed vessel called the Independencia del Sud, which had been fitted out by some merchants of the United States in the port of Baltimore, and sent to Buenos Ayres for sale, where she was purchased by the *de facto* Government of Buenos Ayres, at that time engaged in war with Spain. The question came before the Supreme Court on appeal from the Circuit Court for the district of Virginia, in which the owners of certain cargo captured by the Independencia del Sud and the Altravida claimed that their property, which had been brought *infra præsidia* of the United States, should be restored to them, on the ground that the equipment and sale of the Independencia del Sud was a breach of the Neutrality of the United States. "It is apparent," said Mr. Justice Story, "that although equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, Contraband indeed, but in no shape violating our Laws or our National Neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize for being

3 Opinions of Attorneys General of the United States, Tom. I. p. 61.

engaged in a traffic punishable by the Law of Nations. But there is nothing in our Laws, or in the Law of Nations, which forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no Nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of Contraband. Supposing therefore the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale, there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made by the vessel after the sale was, for that cause alone, illegal[4].

The above judgment proceeds upon the assumption that by the Law of Nations an armed ship, although it be the private property of a Neutral merchant, may be captured by a Belligerent cruiser on the High Seas as Contraband of War, if it be destined to an enemy's port for sale; but that if it has arrived in an enemy's port, a Neutral merchant may lawfully sell it, just as he may lawfully sell a cargo of arms and munitions of war, which he has safely transported over the High Seas to an enemy's market. In accordance with this view we find numerous treaties, in which it is stipulated that ships of war which are being carried to an enemy, shall be liable to capture and confiscation. Thus in Art. XI[5] of the treaty of friendship between Charles II of England and Charles XI of Sweden (anno 1661), it is provided that no merchandise called Contraband, and especially no money, nor provisions, nor arms,

4 The Santissima Trinidad and the St. Ander, 7 Wheaton's Reports, p. 283.

5 This Treaty was renewed by Art. XI of the Treaty of Orebro, 1812. Hertslet's Treaties, Tom. I. p. 328.

nor cannon, &c.; "as also no *ships* of war or convoys be supplied or carried to the enemy, without peril, in case they be taken, of being adjudged lawful prize, without hope of restitution." So likewise in the treaty between Denmark and Great Britain, signed at Copenhagen on 11 July 1670[6], it is provided that the contracting Parties shall not aid or furnish the enemies of either Party, that shall be aggressors, with any provisions of war, as soldiers, arms, engines, guns, *ships*, or other necessaries for the use of war, nor suffer any to be furnished by their Subjects; but if the Subjects of either Prince shall presume to act contrary hereunto, then that King, whose Subjects shall have so done, shall be obliged to proceed against them with all severity, as against seditious persons and breakers of the league." Numerous other treaties might be cited in which *ships* are classed in the same category with money, troops, ammunition, arms, and provisions, as articles which are not to be sent to the enemy. Amongst these may be more particularly noticed a treaty concluded between Charles I of England and the United Provinces (17 Sept. 1625), in which Ships are enumerated amongst those articles of merchandise which are Contraband of War.

"Toutes merchandises de contrebande, comme sont munitions de bouche et de guerre, *Navires*, armes, voiles, cordages, or, argent, cuivre, fer, plomb, et semblables, de quelque part qu'on les voudra *porter* en Espagne et aux autres Pays de l'obeissance du dit Roi d'Espagne et de ses adherens, seront de bonne prise avec les Navires et Hommes qu'ils porteront[7]."

It is competent for a Neutral Power to allow the

[6] This Treaty was renewed by Art. XIII of the Treaty of Kiel, 1814. Hertslet's Treaties, Tom. II. p. 187.

[7] Dumont, Traités, Tom. V. Part II. p. 480.

Subjects of a Belligerent Power to sell ships which are within its ports, even when such ships have been captured from the enemy, provided that the rightful possession of the captors has been affirmed by the sentence of a competent Prize Tribunal. A Neutral Power does nothing incompatible with a state of Neutrality in permitting a Belligerent to transfer his rights of property over a ship within its territory to a Neutral merchant. But when a vessel, which has been sold by a Belligerent in a Neutral port, ventures out of the jurisdiction of the Neutral Power, she ceases to be under its protection and becomes amenable to the Rights of War; and it is the practice of some of the European Powers to refuse to recognise, if they happen to be Belligerents, the sale of any ship by the Enemy to a Neutral merchant after war has commenced, on the ground of such a sale being a fraud of a Belligerent's Rights against the property of the Enemy. The practice of the French tribunals under the Prize regulations of 23 July 1704[8] and 26 July 1778[9] is to refuse to recognise as Neutral Property any vessel of Enemy-build, or which has ever been Enemy-owned, unless the sale of it to a Neutral merchant has taken place before the commencement of hostilities. The British Prize Courts on the other hand recognise such a sale as a valid transaction of commerce, if it be *bonâ fide* and the Enemy's interest has been entirely divested. Lord Stowell held this doctrine repeatedly, and Dr. Lushington, during the war between the Allied Powers and Russia in 1854, observed, in reference to a vessel which had been purchased from a Russian ship-owner by a merchant of Hanover, "that if the *bona fides* of the sale be assumed, it is not to be denied that it

[8] Lebeau, Code des Prises, Tom. I. p. 287.

[9] Ibid. Tom. II. p. 61.

is competent to Neutrals to purchase the property of Enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no Belligerent Right can override it[10]." The United States of America[11] have in a similar manner maintained the Right of any citizen of the United States to purchase a foreign ship of a Belligerent Power, and this anywhere, at home or abroad, in a Belligerent port or a Neutral port, or even upon the High Seas, provided the purchase is *bonâ fide*, and the property be passed absolutely and without reserve.

Sale of Ships of War by a Neutral Power.

§ 228. It has never been a subject of complaint on the part of a Belligerent against a Neutral Power that the latter has permitted an Enemy of the former to effect the sale of a vessel in the course of trade within its ports. But it may reasonably be a subject of complaint on the part of a Belligerent Power against a Neutral Power, if the latter should itself purchase from an Enemy an armed ship which had taken refuge in its ports, or if the latter should itself sell to an Enemy-Power, or to its agents, any vessels of war lying within its waters. The distinction between such a transaction on the part of a Neutral Power, and a similar transaction on the part of a Subject of such Power in the ordinary course of commerce, is obvious. Trade is not the normal occupation of a Sovereign Power in the sense in which it is the business of a merchant; and although, whilst general peace prevails, a State may put on the character of the Merchant without injury thereby resulting to any other State, and may freely sell or buy articles of immediate use in war, it is difficult for it

[10] The Johanna Emilia, 1 Spinks's Eccl. and Adm. Reports, p. 321.

[11] Letter of Attorney General Cushing of Aug. 7, 1854, to Mr. Secretary Marcey. Opinions of the Attorneys General of the United States, Vol. VI. p. 652

to enter into the *arena* of commerce in time of war, and to sell its surplus stores of arms, or its surplus ships of war, with the best of faith to one of two Belligerent Powers without inflicting an injury upon the other Belligerent. Thus in 1825, whilst Spain was engaged in war with her revolted Subjects in Mexico, the Swedish Government put up six Public vessels of war for sale, which were purchased by the Swedish house of Michelson and Benedick, which transferred them to the English house of Barclay, Herring, Richardson, and Co., of London, who were the financial agents of the Revolted Colonies. There was no doubt that this purchase had been made for the account of the Insurgents, and the Spanish Secretary of Legation, M. D'Alvarado, was instructed by his Government to make a representation to the Swedish Government, and to press it to cancel the sale of the ships, alleging that Spain had no doubt of the good faith of Sweden, but that the latter had been deceived into an act of disloyalty by the agents of the Insurgents. Sweden for a long time hesitated to exercise her Rights of Sovereignty over the vessels which were still within her ports, but the Envoys of several of the European Powers having supported the remonstrances of Spain, Sweden ultimately consented to cancel the sale of three of the vessels, which were still lying in Swedish ports. M. de Cussy[12], in commenting on the above transaction, remarks, that "the original sale of the vessels was in itself without doubt a purely commercial transaction on the part of the Swedish Government, divested of all political motive, and as such perfectly legitimate; but that as soon as it was shown that the vessels were in all probability destined for the use of the Insurgents,

[12] Phases et Causes Célèbres du Droit Maritime des Nations par Baron Ferdinand de Cussy, Tom. II. p. 402.

the Swedish Government could not consistently with Neutrality refuse to exercise its jurisdiction over the vessels which were still within Swedish waters, and to prevent them sailing out to join the naval forces of the Mexicans. A similar distinction has been made between the act of a Neutral Power in supplying a Belligerent vessel of war with coals out of the Government stores, and the act of a Neutral Power in allowing merchants resident within its Territory to supply, in the customary course of their trade, coals to a Belligerent vessel. Coal is an article *ancipitis usus*, and as such may be supplied freely by Merchants within the jurisdiction of a Neutral Power in the course of their trade[13], but for a State to furnish supplies of it to a Belligerent vessel of war out of the Government stores has been held to be inconsistent with the Neutrality of the State[14].

Modified Neutrality under Treaty-engagements.

§ 229. A Nation may contract Treaty-engagements with another Nation, binding itself to exercise in a certain manner its Rights of Sovereignty within its Territory, in case the other contracting Party should be involved in war; for instance, that it will not allow the vessels of war of the Enemy an asylum within its waters, except they should be in a state of distress, or that it will not allow a free passage across its territory to the Enemy's forces, or that it will not allow Enemy-merchants to purchase munitions of war in its markets, or that it will not allow its own Subjects to furnish arms or warlike stores to the Enemy. The fulfilment of such Treaty-engagements will not be inconsistent with the Neutral Character of a Nation, if it should deny to both of two Belligerent Parties that liberty of commerce,

[13] Circular Despatch of the British Secretary of State for the Colonies of Nov. 15, 1851.

[14] Despatch from the British Secretary of State for the Colonies to the Governor of Bermuda. Papers relating to Foreign Affairs presented to Parliament, 1862.

which it has bound itself by Treaty to refuse to one of them. Thus Great Britain had entered into Treaty-engagements[15] with Spain, in 1814, not to allow any British subject to furnish arms, ammunition, or any other warlike articles, to the Insurgents in America. In 1819 the Revolted Colonies had succeeded in establishing their Independence *de facto*. The insurrection thenceforth took the character of a war between a Government *de jure* and a Government *de facto*. The British Government had already in 1817, in order to observe Neutrality, and at the same time to give full effect to her Treaty-Engagements with Spain, issued a Proclamation prohibiting the exportation of arms and munitions of war to Spain as well as to her Insurgent Colonies, but it being open to doubt, whether the existing Statute Law applied to the service of Powers, which were not acknowledged amongst the Family of Nations, the British Parliament, in deference to the arguments of Lord Castlereagh and Mr. Canning[16], armed the Executive Government with full authority, under 59 Geo. III, c. 69, commonly called the Foreign Enlistment Act, to prevent the enlistment of troops or the arming of vessels to be employed in the service of any person or persons exercising the powers of Government *de facto* in any Country, equally as of any acknowledged Power. The British Government accordingly took advantage of the powers conferred upon them by British Law to prevent the enlistment of troops and the equipment and armament of vessels in British Ports to be employed in the service of either Belligerent Party against its enemy, as the only measure whereby the Crown of Great Britain

The Foreign Enlistment Act.

[15] Additional Articles to the Treaty of Friendship and Alliance between Great Britain and Spain, 23 Aug. 1814. Martens, N. R. IV. p. 122.

[16] Hansard's Parl. Debates, XL. p. 367, 904, 1102.

could at once observe its Treaty-engagements with Spain, and maintain a state of Neutrality between the Belligerents. At a later period however, when war was imminent in 1823 between Spain and France, the British Government determined not to enforce the provisions of the Foreign Enlistment Act, as, although the enforcement of its provisions would have been sounding to Neutrality, it would have in fact operated most partially in favour of France. An Order in Council was accordingly issued, removing the prohibition to export arms and munitions of war from British ports to Spain. Mr. Canning[17], in defending the conduct of the British Government on this occasion, observed, " It was in order to give full and impartial effect to the provisions of the Treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the Act of 1819 declared that the prohibition should be mutual. When however, from the tide of events, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, we must either extend to France the prohibition which already existed with respect to Spain, or we must remove from Spain the prohibition to which she was at present subject; provided we meant to place the two countries on an equal footing. As far as the exportation of arms and ammunition was concerned, it was in the power of the Crown to remove any inequality between the Parties simply by an order in Council. Such an order was consequently issued, and the prohibition of exporting arms and ammunition to Spain was taken off. By this measure His Majesty's Government afforded a guaranty of their *bonâ fide* Neutrality. It is obvious that the mere appearance

[17] Hansard's Parliamentary Debates, N. S. VIII. p. 1050.

of Neutrality might have been preserved by the extension of the prohibition to France instead of by the removal of the prohibition from Spain; but it would have been a prohibition in words only, and not at all in fact; for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory."

Non-interference with trade consistent with the neutrality of a State.

§ 230. In reviewing the opposite lines of conduct which Great Britain pursued on the above occasions, with a view to maintain a state of Neutrality, a question suggests itself, whether it is more consistent with that *bonâ fide* impartiality which becomes a Neutral State, for her to prohibit both Belligerents from trading in her ports during the continuance of their hostilities, or to permit them both to enjoy equal facilities of trade as in time of peace? Circumstances may occur, in a period of general peace, which will warrant a State in prohibiting the exportation of any warlike stores from her ports; as, for instance, if she have reason to expect that she may herself be soon involved in war. And considerations of a like nature may equally warrant a State in prohibiting the exportation of any warlike stores from her ports at a time when war exists between other States. No Neutral State is responsible to any Belligerent State for measures which she feels called upon to adopt for her own security within the limits of her own Sovereignty. On the other hand, it is the privilege of every Neutral Nation, as such, to maintain relations of peace with both Belligerents, and either Belligerent may justly expect that a Neutral Nation will not prohibit any trade within its ports, whenever such prohibition would clearly work a greater prejudice to one Belligerent than to the other, and so be indirectly an act of favour to the latter. Sir W. Scott[18]

[18] The Eliza Ann, 1 Dodson, p. 244.

has observed, "If a Sovereign has shown more favour to one side than to the other—if he has excluded the ships of one of the Belligerents from his ports and hospitably received those of the other—he cannot be considered as acting with the necessary impartiality. I do not think a country, showing such an invidious distinction, entitled to claims in the character of a Neutral State. The high privileges of a Neutral are forfeited by the abandonment of that perfect indifference between the contending parties in which the essence of Neutrality consists." It would seem then that a Belligerent Power, as such, has no right to call upon a Neutral Power to exercise its rights of Sovereignty within its own Territory in any other manner than in time of peace, provided the Neutral Power is acting with impartiality towards the Belligerent Power and its adversary. It is a less questionable act therefore for a Neutral Power to allow its markets to be open equally to the Subjects of both Belligerent Powers, than to prohibit to both parties the exportation of provisions, or ammunition, or arms, or ships, or any other article available for Belligerent purposes. A Nation may indeed, in appearance, act with impartiality in issuing and enforcing such prohibitions, whilst in substance it may be favouring the one party more than the other. For instance, a war may arise between two countries, one of which in time of peace exports arms and imports provisions, whilst the other exports provisions and imports arms; in other words, between two countries, one of which is highly advanced in manufacturing industry, whilst the other is strictly agricultural. It is obvious that a Nation will not act with impartiality towards both Belligerents if it should prohibit the exportation of arms and allow the exportation of provisions. Again, one Belligerent may be in want of ships, and the

other Belligerent may be in want of horses. It will evidently not be consistent with a State of Neutrality for a State to allow a free commerce to both Belligerents in horses within its ports, and to prohibit a free commerce in ships, if her subjects in time of peace are accustomed to trade freely with foreign merchants in ships and horses. On the other hand, if a State does not impose any restraints upon commerce within her Territory during a period of warfare between other Powers, but affords to the Subjects of either Belligerent free access to her markets, and if it should happen that the one Belligerent derives from commerce in her ports more advantages than the other Belligerent, she may justly allege, that if her continuing to allow free access to her markets to the Subjects of both Belligerent parties equally as to the Subjects of other Nations operates more beneficially to one of the Belligerent parties than to the other, it is by reason of the alteration of their mutual relations towards each other, over which she has no control, and not by reason of any alteration in her conduct towards either of them. Any change which a Nation may make upon war breaking out between other Nations, by interdicting the commerce of either of them in her ports, may expose the good faith of a Nation to question, whenever the change operates more prejudicially against the one than against the other of the two Belligerent parties. On the other hand, the maintenance of an order of things which existed prior to the war, against which no complaint was raised in time of peace by any other Nation, cannot expose a neutral Nation to any imputation of bad faith towards either of two Belligerent parties.

§ 231. "The United States of America," as observed in a judgment of the Supreme Court in

1817[19], "instead of opening their ports to all the contending parties, when at peace themselves (as may be done, if not prevented by antecedent Treaties), have always thought it the wisest and safest course to interdict them all from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments." The United States first adopted this policy, as a Neutral State, in 1794[20], when M. Genet, the French Minister at Washington, was endeavouring to work upon the sympathies of the States for the purpose of involving them in war with Great Britain, and they have persevered in the same policy down to the present day. Thus the Act of Congress of 1818, although it does not prohibit armed vessels fitted out by citizens of the United States from sailing out of their ports, requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign Powers at peace with the United States. Accordingly, when Denmark remonstrated against the Government of the United States allowing a steam vessel of war, which had been purchased by the Government of the German Empire, at that time engaged in war against Denmark, to leave the ports of the United States, the United States Government refused to permit the vessel to quit its waters, until a bond had been executed in compliance with the Act of Congress of 1818, that the vessel should not be employed to cruise or commit hostilities against any State, with which the United States were at peace[21]. On the other hand, "the Laws of the United States do not forbid their citizens to sell

The Policy of the United States of America, as a Neutral Power, to interdict certain branches of trade.

[19] The Estrella, 4 Wheaton, p. 448.

[20] Waite's American State Papers, Vol. I. p. 89.

[21] Annuaire des Deux Mondes, 1852–53, p. 485. Lawrence's Wheaton, second annotated edition, p. 95. Editor's note.

to either of the Belligerent Powers articles Contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and although, in so doing, the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of National Neutrality, nor of themselves implicate the Government." Such was the purport of the message delivered by the President of the United States on 31 December 1854[22], and in the following month of October 1855 an Official Declaration on the same subject was issued from the office of the Attorney-General, the legal organ of the Government of the United States[23]. "It is no departure from Neutrality," is the language of this Declaration, " for the citizens of a Neutral State to sell to belligerents gunpowder, arms, munitions, or any other articles of merchandise Contraband of war, or for the merchant ships of a Neutral State to transport the troops or military munitions of either Belligerent. Such commerce is perfectly lawful in itself, subject always to the chances of hostile capture by the other Belligerent; and in the present war, supplies of gunpowder or other articles Contraband of war, and military transportation, have been furnished of Lawful Right by citizens of the United States, to each of the Belligerents, but more especially and in larger proportions to Great Britain and to France." To the same effect President Pierce had observed, in the message above cited, that " during the progress of the present war in Europe our citizens have, without National responsibility therefore, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and

[22] Message of President Pierce. Annuaire Hist. Universel, 1855, App. p. 211.

[23] Sammlung Officieller Actenstücke, &c., Hamburg, 1855. Neue Folge, II. p. 22.

still continue to be, largely employed by Great Britain and France in transporting troops, provisions, and munitions of war, to the principal seat of military operations, and in bringing home the sick and wounded soldiers; but such use of our mercantile marine is not interdicted either by the International, or by our Municipal Law, and therefore does not compromise our Neutral relations with Russia."

Trade, unless interdicted, not a violation of the Sovereignty of a Neutral State.

§ 232. A distinction must always be kept in mind between acts of civil life within the Territory of a Neutral Nation which violate its Right of Sovereignty, and acts which do not violate it. No transaction of commerce between Belligerent merchants or between a Belligerent merchant and a Neutral merchant, entered into or completed within Neutral Territory, is an offence against the Sovereignty of the Neutral Nation, unless it should be forbidden by its Territorial Law. All offences against the Law of a State committed by any person whatsoever within its Territory are offences *læsæ majestatis*, and may be punished by the State as such, unless the offender be the subject of a foreign Power, with which there are Treaty-engagements in restraint of the independent action of the State in such matters. A particular transaction of commerce equally with any other act of civil life may be forbidden by the Law of a State, as, for instance, the sale of a freeman into slavery, and all parties within the Territory of that State, who should be engaged in such a transaction of commerce, would be guilty of an offence against its Sovereign Power. It is immaterial with regard to the binding force of the Law of a State whether there is a state of War beyond its Territory or not, and whether the parties within its Territory, who may infringe its Law, are Subjects of a Belligerent or a Neutral State. For instance, to enlist for military service the Subjects of an Independent

Prince within his Territory, without his permission, is a violation of his Rights of Sovereignty. Accordingly, if a foreign vessel of war should enter the harbour of an Independent State, and its Commander should enlist any of the Subjects of that State to serve on board his vessel, without the license of the Sovereign Power, it would be a violation of the Sovereignty of the State, and accordingly the augmentation of the force of a Belligerent vessel of war in the harbour of a Neutral State without the license of the Sovereign Power, will be a breach of the Law of Nations. It has therefore been held by Courts which administer the Law of Nations, that such an unlawful augmentation of the force of a Belligerent vessel of war in the port of a Neutral Nation will infect every capture made during the voyage, upon which she is engaged with the character of a Maritime *tort*, which the Neutral Nation is empowered to redress, if the Belligerent vessel should bring any capture within the Territory of the Neutral Nation. A question of this kind came before the Supreme Court of the United States, on appeal from the District Court of Virginia, in reference to the cargo of a Spanish vessel, which had been captured by two Belligerent cruisers commissioned by the *de facto* Government of Buenos Ayres. Although the independence of Buenos Ayres had not at such time (April 1817) been recognised by the Government of the United States, the existence of a Civil War between Spain and her Colonies had been recognised by it, and each party was deemed by it to be a Belligerent Nation, having, so far as concerned the United States, the Sovereign Rights of War, and entitled to be respected in the exercise of those Rights. One of the Belligerent cruisers, which had effected the capture of the Spanish vessel, came into the port of Virginia, and there, with the consent of

the Custom-house Authorities, landed for safe keeping a quantity of property which had been taken out of the captured vessel. The original Spanish owner of this property, through the medium of the Spanish Consul at Norfolk, thereupon commenced proceedings in the District Court of Virginia for the recovery of his property, as having been captured under circumstances, which involved a violation of the Neutrality of the United States. Two pleas were relied upon by the claimants as justifying restitution: 1. that the Belligerent cruiser had been originally equipped, armed, and manned as a vessel of war in the ports of the United States; 2. that there had been an illegal augmentation of the force of the Belligerent vessel during her cruise, whilst she was in a port of the United States.

The Court dismissed the first plea in a few words. "It is apparent," says Mr. Justice Story, "that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, Contraband indeed, but in no shape violating our Laws or our National Neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemnable as good Prize for being engaged in a traffic prohibited by the Law of Nations. But there is nothing in our Laws, or in the Law of Nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure, which no Nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale, (and there is nothing in the evidence before us to contradict this,) there is no pretence to say that the original outfit on her voyage was illegal, or that a capture made after the

sale was, for that cause alone, illegal." But on the second plea the Supreme Court held that, as it was proved that during the stay of the Belligerent cruiser in the port of Baltimore she had enlisted thirty persons, there was an illegal augmentation of her force by a substantial increase of her crew, and that such an augmentation of her force was not merely an infraction of the Municipal Law of the United States, subjecting the offender to personal penalties, but was a violation of the Law of Nations, infecting all captures made during the cruise. "It has never been held," says Mr. Justice Story, "that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violation of Public Law, the offence may be well deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this Court has long been established, that such illegal augmentation is a violation of the Law of Nations, as well as of our own Municipal Laws, and as a violation of our Neutrality, by analogy to other cases, it infects the captures subsequently made with the character of *torts*, and justifies and requires a restitution to the parties who have been injured by the misconduct. It does not lie in the mouth of wrong-doers to set up a title derived from a violation of our Neutrality. The cases in which this doctrine has been recognised and applied have been cited at the bar, and are so numerous and so uniform that it would be a waste of time to discuss them or to examine the reasoning by which they are supported[24]."

[24] The Santissima Trinidad and the St. Ander, 7 Wheaton's Reports, p. 348.

The offence of violating the Territory of a Neutral Nation by enlisting seamen within its ports to man a Belligerent vessel, without the previous consent of the Sovereign Power of the Nation, has been held by the Supreme Court of the United States[25] not to be purged by the discharge of her crew in a foreign port, if the same crew has been re-enlisted in that port, and the vessel has thereupon proceeded to sea, and made captures under the commission of a Belligerent Power. Under such circumstances, the Supreme Court held that the discharge of the crew was a colourable transaction, and that a Neutral Power was justified in enforcing its Neutrality by the restitution of the prizes made by the Belligerent vessel, when those prizes had been brought within the Neutral Jurisdiction. The same Court[26] has held that the sale of a vessel in a Belligerent port to the Belligerent Government was a colourable sale, insufficient to purge the offence of a breach of Neutral Territory, where an interest in the prizes made by the vessel could be traced as still attaching to the parties who had committed the offence. The Courts of the United States appear, from a long series of decisions, to hold it to be the Right of the Courts of a Neutral Nation to require from Belligerents as strict proof of *bona fides* on their part, in matters involving a violation of its Neutrality, as the Courts of Belligerent Powers require from Neutrals in matters involving a violation of their Belligerent Rights, and that every Neutral Power is entitled to refuse the use of its Territory for any Belligerent purpose, and to vindicate its refusal by restoring all prizes made in violation of

[25] The Gran Para, 7 Wheaton, p. 471.

[26] The Monte Allegre and the Rainha de los Anjos, 7 Wheaton, p. 520.

its Territory, if they should be brought by her captors within its Territory.

Jurisdiction over captures in Neutral waters exercised by the Neutral Power.

§ 233. The principle upon which the Courts of the United States, sitting as Courts of a Neutral Nation within Neutral Territory, have claimed to exercise a Jurisdiction over Prize of War, has been lucidly set forth by Mr. Justice Washington. "The general rule," he observes[27], "is undeniable, that the trial of captures made on the High Seas, *jure belli*, by a duly commissioned vessel of war, whether from an Enemy or a Neutral, belongs exclusively to the Courts of that Nation to which the captors belong. To this rule there are exceptions, which are as firmly established as the rule itself. If the capture be made within the territorial limits of a Neutral country, into which her prize is brought, or by a privateer which has been illegally equipped in such Neutral country, the Prize Courts of such Neutral country not only possess the power, but it is their duty, to restore the property so illegally captured to the owner. This is necessary to the vindication of their Neutrality. A Neutral Nation may, if so disposed, without a breach of her Neutral character, grant permission to both Belligerents to equip their vessels of war within her territory. But without such permission, the subjects of such Belligerent Powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such Neutral Nation. Such unauthorised acts violate her Sovereignty, and her rights as a Neutral. All captures by means of such equipments are illegal in relation to such Nation, and it is competent to her Courts to punish the offenders; and in case the prizes taken by them are

27 The Brig Alerta and Blas Moran, 9 Cranch, p. 364.

brought *infra præsidia*, to order them to be restored." Traces of the exercise of this Jurisdiction on the part of Great Britain as a Neutral Power are found in the writings of Sir Leoline Jenkins[28], who was Judge of the High Court of Admiralty of England in the reigns of Charles II and James II. In a letter written on 5 Dec. 1665, after hearing what was alleged on both sides, he advises his Majesty in Council to decree restitution of the St. Anne of Ostend, which had been brought into Dover by a Portuguese Privateer, on the ground that the Privateer had set out from Dover manned for the most part with British subjects, and hovered off that port, in violation of the protection and safeguard which your Majesty's authority affords to strangers coming upon their lawful occasions towards any of your Majesty's Harbours or Ports. On another occasion[29], (11 Oct. 1675,) when a French Privateer had captured a merchant vessel belonging to the port of Hamburg, within one of the King's Chambers, the same learned Judge advised his Majesty in Council that the Hamburger being taken in one of his Majesty's Chambers, and being bound to one of his Majesty's ports, ought to be set free. Other instances of the restitution of vessels, which had been captured in violation of Neutral Territory, will be found amongst the judgments of this eminent Civilian, who was at the same time very careful[30] not to encroach upon the clear and undoubted Rights of War of Belligerent cruisers. The Right of a Neutral country, according to the modern practice of Nations, to take cognisance of Prize of War, when there

[28] Life of Sir Leoline Jenkins, II. p. 727.

[29] Life of Sir Leoline Jenkins, II. p. 780.

[30] Letter to the King upon the judgment of the Court of Admiralty at Dublin, 5 Jan. 1679–80. Life, II. p. 783.

has been an infringement of its Territory, has been incidentally recognised by Lord Stowell[31]; but there are no cases to be found in the Reports of the proceedings of the English Courts of Admiralty in modern times, in which this question has been directly raised and decided.

Ancient Jurisdiction exercised by Neutral Powers in matters of Prize.

§ 234. It seems at one time to have been generally held to be within the competency of the Admiralty Court of a Neutral Nation to take cognisance of all captures made on the High Seas of the property of its own Subjects by Belligerent vessels, if the captors should have brought their prizes into its ports. The Ordonnance de la Marine of Louis XIV (art. XV) directs, that if on board of prizes brought into French ports by foreign armed vessels, there shall be found goods belonging to the Subjects of France or its allies, the goods so belonging to French Subjects shall be restored. Valin says, that this Right is exercised in favour of Subjects by way of compensation for the asylum granted to the captor and his prize; but he expressly states that the rule does not extend to the goods of allies[32]. According to the opinion of Sir Leoline Jenkins[33], it was in accordance with the General Law of Nations in the seventeenth century for the Admiralty Court of a Neutral Nation to order the restitution of goods belonging to its citizens, if they had been captured by a Belligerent on board an enemy vessel, and the latter should have been brought by the captor within the jurisdiction of the Neutral Nation. Thus, he observes, in the case of a Spanish ship taken by a Portuguese frigate, which had brought her Prize into a British port, "The last question is, (for I do not

[31] The Fladoyen, 1 Ch. Rob. p. 144.

[32] 2 Valin, Comment. p. 274. Traité des Prises, c. 7. p. 176.

[33] Life and Works of Sir L. Jenkins, pp. 732, 780.

find anything material made out against the validity of the Portuguese Commission,) in the case of your Majesty's subjects, Sir Arthur Ingram and the Canary Company, to whom a third part of the lading belongs, whether their goods shall be Prize in this Spanish bottom. 'Tis certain they are relievable upon the General Law; and whatever became of the Biscayer, the English goods might and ought to be taken out, and restored to the owners." On another occasion (11 Oct. 1675) the same learned Judge, after advising the restitution of a Hamburger ship captured by a French Privateer in an English Chamber, proceeds to say, "The last question is, whether the Englishmen should have such goods as belong to them in property taken out of the Prize, and restored to them here, or else be forced to go to France to claim and recover them. It is my opinion they should be forthwith taken out and restored, they making full and clear proof of their property that they were and are upon their own account and risk (as some have already done in the Admiralty), and purging themselves by oath that they do not claim or colour anything belonging to the Hamburgers, for where the thing in contention is within your Majesty's Jurisdiction, there justice ought to be administered, and nowhere else. And I do humbly conceive that the French Privateer hath the less pretence for a Renvoy into France, because the Law is the same in that country." M. Ortolan[34], in treating of the Right of Neutral Asylum, observes, after discussing the cases of illegal capture within Neutral Waters, and the case of illegal equipment within Neutral Territory, goes on to say, "Les Règlemens particuliers de quelques Puissances y ajoutent un autre cas, celui où la prise a été faite sur les propres

34 Diplomatie de la Mer, Tom. II. L. III. c. 8. p. 265.

sujets de l'Etat Neutre, sous prétexte de Contreband de guerre ou de toute autre cause dans des conditions, qui aux yeux de l'Etat, la rendent illégitime." If indeed it should be alleged that a capture has been made without lawful Commission, or fraudulently and piratically under pretext and colour of Belligerent Right, Neutral Admiralty Courts may without doubt entertain jurisdiction under the Law of Nations for the purpose of enquiring into the Right of the captor to make capture on the High Seas; but if it be established that the captor is lawfully commissioned by a Belligerent Power, and has seized the ship and goods *jure belli*, the trial of Prize or no Prize cannot, according to the modern practice of Nations, be adjudicated by the Admiralty Court of any Neutral Nation, but belongs exclusively to the Courts of the Power to which the captor belongs. The general doctrine, that the trial of Prize belongs exclusively to the Courts of the State to which the captor belongs, is now too firmly settled to admit of doubt," is the language of Mr. Justice Story[35]. In the great argument respecting the Silesian loan, it is laid down in emphatic terms, that "the proper and regular Court for these condemnations is the Court of that State to which the captor belongs[36];" and that in this method, by the Courts of Admiralty acting according to the Law of Nations and particular Treaties, all captures at sea have immemorially been judged of in every country of Europe." The exemption in favour of the Admiralty Courts of a Neutral Nation exercising jurisdiction over captures brought *infra præsidia* of the Neutral Power, has been thought to

35 The Invincible, 2 Gallison, p. 35.

36 Letter of the Duke of Newcastle of 8 Feb. 1753, in answer to the Prussian Memorial. Collectanea Juridica, London 1791, pp. 135, 137.

derive some countenance from a decision of the Supreme Court of the United States in the year 1794, in the case of a Swedish vessel, the Betsey, laden with Swedish and American property, which had been captured by a French privateer, the Citizen Genet, on the High Seas, and sent into the port of Baltimore[37]. The Supreme Court overruled in this case the decrees of the District and Circuit Courts declining jurisdiction, and held that the Admiralty Courts of the United States were competent to enquire and decide whether restitution should be made to the claimants in whole or in part, (that is, whether such restitution can be made consistently with the Law of Nations and the Treaties and Laws of the United States.) But this judgment was very carefully reviewed by the Supreme Court of the United States in 1816, which held that the only question settled in the case of Glass *v.* the Betsey was, that the dispossession of the master and crew of any vessel on the High Seas was *primâ facie* a Maritime *tort*, of which every Admiralty Court might take cognisance according to the Law of Nations; and that the case was sent back by the Supreme Court with a view that the District Court should exercise jurisdiction, subject however to the Law of Nations on this subject as the rule to govern its decision. On this occasion, Mr. Justice Johnson[38], in delivering the judgment of the Supreme Court, observed, that "every violent dispossession of property on the ocean is *primâ facie* a maritime *tort;* as such, it belongs to the Admiralty jurisdiction. But sitting and judging as such Courts do, by the Law of Nations, the moment that it is ascertained to be a seizure by a com-

37 Glass *v.* the Sloop Betsey, 3 Dallas, p. 6.

38 L'Invincible, 1 Wheaton, p. 258.

missioned cruiser, made in the legitimate exercise of the Rights of War, their progress is arrested; for this circumstance is in those Courts a sufficient evidence of Right. "That the mere fact of seizure, as Prize, does not of itself oust the Neutral Admiralty Court of its jurisdiction, is evident from the fact that there are acknowledged cases in which the Courts of a Neutral may interfere to divest possession; to wit, those in which her own Right to stand Neutral is invaded; and there is no case in which the Court of a Neutral may not claim the Right of determining whether the capturing vessel be in fact the commissioned cruiser of a Belligerent Power[39]. Without the exercise of jurisdiction thus far, in all cases, the power of the Admiralty would be inadequate to afford protection from piratical capture." But the Court of a Neutral Power will only so far enquire into the Commission of the capturing vessel as to ascertain its authenticity. The Commission of a Public Ship, duly authenticated by the signature of the proper authorities of the Nation to which she belongs, imports absolute verity[40], so far at least as Foreign Courts are concerned, and is complete proof of the title to exercise Belligerent Rights.

Neutral Courts do not entertain questions of Damages.

§ 235. The same considerations of Comity which are now held to preclude the Court of a Neutral Nation from sitting in judgment on the question of the validity of a capture made upon the High Seas, even if the captured property should be voluntarily brought by the captor within its jurisdiction, preclude it from entertaining the question of Damages, even when the seizure has been made within its Territory, and the Neutral Court has de-

39 Life of Sir Leoline Jenkins, Vol. II. p. 727.

40 The Santissima Trinidad and the St. Ander, 7 Wheaton, p. 336.

creed that the vessel and her cargo shall be set free. If a Belligerent cruiser has attacked and seized an enemy vessel within Neutral Territory, no Right of the enemy vessel has been violated by such an attack and seizure; for no Rights exist between enemies, except what are termed Rights of War, and one of the Rights of War is to attack and destroy an enemy, wherever he may be found. "A capture made within Neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the Neutral Sovereign that its legal validity can be called in question; and as to him, and him only, is it to be considered void[41]." A Neutral Power may interpose at any time and forbid a Belligerent to exercise within its Territory the Rights, which a state of War gives rise to as against his adversary: it may arrest, in virtue of its exclusive Sovereignty over the place, a combat between Belligerents *dum fervet opus;* or if the combat should have been brought to an end by the submission of one of the combatants, it may require the victor to set the vanquished party free; but when a Neutral Power so interposes between Belligerent parties, it does not profess to redress a wrong done by one Belligerent to another, but it refuses to allow a Right of War to be exercised by a Belligerent against his enemy, because the Territory of a Neutral State is by the Law of Nations not subject to the exercise of any Right of War against the will of the State. Accordingly, if a Belligerent vessel has attacked an enemy vessel within Neutral territory, and has been worsted in the conflict, the Neutral Power may justly decline, if it sees fit, to interpose between the vanquished party and the operation of the *jus belli*, which it has been the first to invoke. "Whilst the

[41] The Anne, 3 Wheaton, p. 447.

ship was lying within Neutral waters, she was bound," says Mr. Justice Story[42], "to abstain from all hostilities except in self defence. The Privateer had an equal title with herself to the Neutral protection, and was in no fault in approaching the coast without showing its National character. It was a violation of that Neutrality, which the captured ship was bound to observe, to commence hostilities for any purpose in these waters, for no vessel coming here was bound to submit to search, or to account to her for her conduct or character. When therefore she commenced hostilities, she forfeited the Neutral protection, and the capture was no injury for which any redress would be rightfully sought from the Neutral Sovereign."

The Supreme Court of the United States has accordingly held that the jurisdiction of a Neutral Court of Admiralty over captures made in violation of Neutral Territory, is exercised only for the purpose of restoring the property which has been voluntarily brought *infra præsidia*[43] of the Neutral Power, and does not extend to the awarding of damages against the captors as in ordinary cases of maritime *torts*. A Spanish ship[44] was captured on the High Seas by a Venezuelan Privateer, La Guerriere, and subsequently brought into the port of New Orleans. It was established that the Privateer had augmented her crew in the United States during the cruise, and before the capture, in violation of the Neutrality of the United States; and one of the questions raised upon appeal before the Supreme Court was, whether

[42] The Anne, 3 Wheaton, p. 447.

[43] Præsidia vero non esse navim, ad quam deducta erant bona capta, certum est, quæ inter mobilia numeratur; præsidia autem stationes. Alberic. Gentilis, Hispan. Advocationes, L. I. c. 11.

[44] La Amistad de Rues, 5 Wheaton, p. 385.

the District Court of New Orleans had rightfully decreed damages against the captors. Mr. Justice Story, in delivering the judgment of the Supreme Court in reversal of the decree of the District Court as to damages, observed: "The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our Neutrality, if the Prize comes voluntarily within our jurisdiction, it shall be restored to its owners. This is done upon the footing of the General Law of Nations, and the doctrine is fully recognised by the Act of Congress of 1794. But this Court has never yet been understood to carry its jurisdiction in cases of violation of Neutrality beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceeding. We are now called upon to give general damages for plunderage; and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in ordinary cases of marine *torts*. We entirely disclaim any right to inflict such damages; and consider it no part of the duty of a Neutral Nation to interpose, upon the mere footing of the Law of Nations, to settle all the rights and wrongs which may grow out of a capture between Belligerents. Strictly speaking, there can be no such thing as a marine *tort* between enemies. Each has an undoubted Right to exercise all the Rights of War against the other; and it cannot be made a matter of judicial complaint, that they are exercised with severity, even if the parties do transcend those rules which the Customary Laws of War justify. At least they have never been held within the cognisance of the Prize tribunals of Neutral Nations. The captors are amenable to their

own Government exclusively for any excess or irregularity in their proceedings; and a Neutral Nation ought not otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its Neutral jurisdiction. A Neutral Nation may indeed inflict pecuniary or other penalties on the parties for such violation, but then it does it professedly in vindication of its own Rights, not by way of compensation to the captured. When called upon by either of the Belligerents to act in such cases, all that justice seems to require is, that the Neutral Nation shall fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound therefore to restore the property, if found within its own ports; but beyond this it is not obliged to interpose between the Belligerents. If indeed it were otherwise, there would be no end of the difficulties and embarrassments of Neutral Prize tribunals. They would be compelled to decide in every variety of shape upon marine trespasses *in rem* and *in personam*, between Belligerents, without possessing adequate means of ascertaining the real facts, or of compelling the attendance of witnesses, and thus they would draw within their jurisdiction almost every incident of Prize. Such a course of things would necessarily create irritations and animosities, and very soon embark Neutral Nations in all the controversies and hostilities of the conflicting parties. Considerations of policy came therefore in aid of what we consider the Law of Nations on the subject."

A Neutral Power may claim a vessel captured in violation of its Territory, before

§ 236. The Court of a Neutral Power, in decreeing restitution of property which has been captured by a Belligerent in violation of its Territory, when such property has been brought by the Belligerent *infra præsidia* of the Neutral Power, performs a duty in

a Belligerent Prize Court.

which all Belligerents have an equal interest, and which the Court of the Captor is itself bound to discharge, if the property should be brought *infra præsidia* of the Belligerent Power, under whose Commission the capture has been effected. It is also the privilege of the Neutral Power, within whose Territory a vessel has been captured by a Belligerent cruiser, if the vessel should be carried into a port of the Captor's country, to pursue the vessel in the Courts of the Captor, and to demand its restitution, on the ground that its seizure was a trespass upon its Neutrality. It is not however competent for the owner of a vessel to raise in the Court of a Belligerent Captor the objection, that the capture of the vessel is invalid by reason of its having been effected in violation of the Territory of a Neutral Power. Further, if in the absence of any suggestion from the Government of the Neutral Nation, whose Territory may have been violated, a vessel shall have been condemned in a competent Court of Prize jurisdiction, as good Prize, and sold to a third party under a decree of the Court, the purchaser will have a good title everywhere to the vessel, and may successfully resist any subsequent claim of the former owner, if the vessel should be found within the jurisdiction of the Neutral Nation, whose Territory may have been violated by the act of capture. The case of the Fanny[45] does not conflict with this view of the law, for in that case the Supreme Court of the United States, sitting as a Neutral Admiralty Court and decreeing restitution of property captured in breach of the Neutrality of the United States, held that there had been no condemnation of the pro-

[45] 9 Wheaton, p. 658.

perty as Prize by a Competent Court; and that even if there had been a *bonâ fide* purchase of the goods, a *tortious* possessor of the property, to which he had no title at all, could not transfer a title to his vendee. There may however be an exception to the rule, that the decree of a competent Court of Prize founds a valid title to a ship, which cannot be called in question in any other Court. If the owner of the Belligerent vessel, which has violated the Sovereign Rights of a Neutral Nation in effecting the capture of an enemy's vessel, should become the purchaser of such vessel under a decree of sale made at his own prayer before a Prize Tribunal of his own country, and should subsequently bring the vessel within the territorial jurisdiction of the Power whose Neutrality was violated by its capture, the Courts of that Power, finding the captured property in the hands of the offender, will disregard the circuit of changes through which it may have passed, and will not allow him to set up a right springing out of his own wrong. Such indeed is the purport of a judgment of the Supreme Court of the United States in the case of the Arrogante Barcelonas[46]. "In the hands of a third person," Mr. Justice Johnson observes, "a valid sentence of condemnation, properly authenticated, would present a very different view of the subject. The offender's touch here restores the taint from which the condemnation may have purified the Prize. Although a purchaser without notice may in many cases hold his purchase free from an interest, with which it was chargeable in the hands of the vendor, yet it cannot return into the hands of the vendor without reviving the original lien. Nor will Courts of Justice

[46] The Arrogante Barcelonas, 7 Wheaton, p 496. Kent's Commentaries on American Law, Tom. I. p. 121.

ever yield the *locus standi in judicio* to the suitor, who is compelled to trace his title through his own criminal acts."

Neutral Powers do not interpose their jurisdiction in cases of Rescue.

§ 237. A Neutral Court of Admiralty has no jurisdiction to decree restitution of a vessel which has been seized by prisoners on board, or has been rescued by its crew from its captors, and carried into a Neutral port, when there has been no breach of its Neutrality. A Neutral State is bound to regard all captures made by either Belligerent party as equally just, excepting in such cases where its own Rights of Sovereignty have been invaded. "The Right of *postliminium*," says Vattel[47], "does not take effect in Neutral countries, for when a Nation chooses to remain Neuter in war, she is bound to consider it as equally just on both sides, so far as relates to its effects, and consequently, to look upon every capture made by either party as a lawful acquisition. To allow one of the parties, in prejudice to the other, to enjoy in her dominions the right of claiming things taken by the latter, or the right of *postliminium*, would be declaring in favour of the former, and departing from the line of Neutrality." Thus the British vessel Vere was taken possession of on the High Seas by a number of French prisoners, who had been put on board of her by the British Government for conveyance from Jamaica to England, and who rose upon the captain as soon as she parted from the Convoy. The vessel was subsequently carried by the French captors into the port of Georgetown, in South Carolina, where a libel was filed in the District Court, praying for restitution of the vessel under the Law of Nations. The Court held that the captors were entitled to the Right of Asylum,

47 Vattel, L. III. c. 14. § 208.

and that their plea in bar to the jurisdiction of the Court ought to be sustained[48]. On the other hand, the United States' merchant-vessel, Lone, commanded by Captain Clarke, in the course of a voyage to New Orleans, as her port of final destination, entered the port of Matamoras, then under blockade by a French squadron. On her homeward voyage she was captured by a vessel belonging to the blockading squadron. Some days after the capture Captain Clarke rescued his vessel, and continuing his original voyage brought her safe into New Orleans, where it terminated. The Government of France applied to the Government of the United States for the vessel and cargo to be delivered up, on the ground of the original forfeiture of the vessel for breach of blockade, and the unlawful rescue of it. On this occasion the Attorney-General of the United States reported to the President of the United States, that there was "no instance known to him in which the United States Government had been called upon to interpose, and restore to the captors property, that was rescued from them by reason of failure on their own part to make the capture sure." By the well settled principles of International Law it is made the duty of the captors to place an adequate force upon the captured vessel; and if from a mistaken reliance on the sufficiency of their force, or misplaced confidence, they fail to do so, the omission is at their peril. No instance is known in which it has been regarded as a ground for asking such interposition as is now sought[49]."

The same considerations of Law apply to Neutral vessels, which have been rescued by their crews from

[48] Reid *v.* Ship Vere. Bee's Reports, p. 66. (22 Jan. 1795.)

[49] Opinions of the Attorneys-General of the United States, Vol. III. p. 327. (11 Oct. 1838.)

a Belligerent captor, and have escaped into a port of their own country after capture. The Supreme Court of the United States, in discussing the point whether the Courts of a Neutral Power were competent to entertain the question of Prize or no Prize in regard to a vessel belonging to a Subject of the Neutral Power, which had been brought into its ports by the Belligerent captor, observed, that "the situation of the captured ship of a citizen is precisely the same as of any other captured Neutral, or rather the obligation to abstain from interference between the captor and the captured becomes greater, inasmuch as it is purchased by a concession from a Belligerent of no little importance to the peace of the world, and particularly of the Nation of the offending individual (namely, that the Neutral Nation shall not be implicated in his misconduct). The Belligerent contents himself with cutting up the unneutral commerce, and makes no complaint to the Neutral Power, not even where the individual rescues his vessel and escapes into his own port after capture[50]."

Conflict of jurisdiction between a Neutral Admiralty Court and a Belligerent Prize Court.

§ 238. A conflict of jurisdiction may arise between a Neutral Admiralty Court and a Belligerent Prize Court, under circumstances of this nature. Property has been sometimes condemned in the Prize Court of a Belligerent Power, notwithstanding that it has been lying in a Neutral port. In case, however, that such property should have been captured in violation of the Neutrality of the State, within whose territorial jurisdiction the captured property has been brought, it will be competent for the Admiralty Court of the Neutral State to decree restitution of such property to the owners, who have been dispossessed of it by the wrongful act of the captors. The captors, on the

[50] L'Invincible, 1 Wheaton, p. 256.

other hand, if they have proceeded *pari passu* in the Prize Court of their own country, may have obtained a decree of condemnation of the property as good Prize of war, in the absence of any suggestion from the Agent of the Neutral State that its Neutrality has been violated. The possible conflict between two such sentences was considered by the Supreme Court of the United States in the case of property, which had been captured by a Belligerent privateer, after it had augmented its crew in a port of the United States during its cruise. It was asserted before the Neutral Admiralty Court that the Prize Court of the Belligerent Power had condemned the property in controversy pending the suit before the Neutral Court. "Assuming," says Mr. Justice Story, in delivering the opinion of the Supreme Court, "for the purpose of argument, that the condemnation was regularly made and is duly authenticated, we are of opinion that it cannot oust the jurisdiction of this Court, after it has once regularly attached itself to the cause. By the seizure and possession of the property under process of the District Court, the possession of the captors was devested, and the property was emphatically placed in the custody of the law. It has been since sold by consent of the parties, under an interlocutory decree of the Court, and the proceeds are deposited in the Registry to abide the final adjudication. Admitting then that property may be condemned whilst lying in a Neutral country, (a doctrine which has been affirmed by this Court,) still it can be so adjudicated only, while the possession of the captor remains; for if it be devested in fact or by operation of the law, that possession is gone, which can alone sustain the jurisdiction. *A fortiori*, where the property is already in the custody of a Neutral tribunal, and the

title is in litigation there, no other foreign Court can by its adjudication rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a Sovereign authority over the Court having possession of the thing, and to take from the Nation the right of vindicating its own justice and Neutrality[51]." Lord Stowell, in administering the Prize Law of the English Admiralty Court in the case of a British vessel captured by a Dutch privateer, which had been sold under a sentence of condemnation passed in a Prize Court at the Hague, whilst the vessel itself was lying in a Norwegian port, was most reluctant to recognise the validity of such a sale, on the ground that "the *res ipsa*, the *corpus*, was not within the possession of the Dutch Court, and possession founds the jurisdiction[52]," but he deferred to the practice which had been not only admitted, but applied by British Prize Courts, and, in violation of what he believed to be the true principle, felt bound by precedent to recognise the title given by the decree of the Dutch Court. But his objection is well worthy of the consideration of Belligerent Powers, for the decree of condemnation of a Belligerent Court must of necessity remain a dead letter, if a Neutral Court should be in possession of the *res*, and should adjudge it to be restored to the owner, on the ground of the capture involving a violation of its Neutrality.

Duties of a Neutral Power in cases of Civil War.

§ 239. If a state of War exists between a Government *de jure* and a Government *de facto* of any Country, foreign Powers are entitled to remain indifferent spectators of the contest, and to allow impartially to both Belligerent parties the free exercise of those

[51] The Santissima Trinidad and the St. Ander, 7 Wheaton, p. 385.

[52] The Henrick and Maria, 4 Ch. Rob. p. 56.

Rights, which War gives to Public Enemies against each other, such as the Right of Search, the Right of Blockade, the Right of capturing Contraband of War and Enemy's property laden in Neutral vessels[53]. A Government *de jure* may notify to foreign Powers that there is an Insurrection against it, whereby its Laws within its Territory are not executed, and that it has deemed it advisable to have recourse to measures of war against the Insurgents by setting on foot a blockade of the ports in their occupation, or otherwise, and by enforcing such blockade pursuant to the Law of Nations. Such a Notification imposes at once upon a foreign Nation the necessity of deciding upon one out of three alternative courses of action. It may assist the Government *de jure*, or it may assist the Insurgents, in either of which cases it becomes a party to the War; or it may remain impartial, still continuing to treat the Government *de jure* as an independent Power, whilst it treats the Insurgents as a Community entitled to the Rights of War against its adversary. It is obviously impossible for a neutral Power to recognise the character of one party as a Belligerent, without acknowledging the Belligerent character of its adversary. As long as an Insurrection against a Government *de jure* is confined within the limits of its Territory, foreign Nations are not concerned in it; but if the contending parties violently assail the lives, vessels, and property of one another on the High Seas, all Nations are necessarily concerned in their quarrel; for the peace of the High Seas is disturbed thereby, which peace can only be lawfully violated by parties, who are exercising Belligerent Rights. A violation of the peace of the High Seas is either an act of Piracy or an act of War, according

53 Wheaton's Elements, Part I. c. 11. § 7.

as such act is done with the design of robbery, or with the object of prosecuting a Right. Lord Stowell declined to treat a capture made on the High Seas by an Algerine Corsair as an act of Piracy, as it had been effected by a vessel belonging to the Dey of Algiers himself, and the Dey had intervened to guaranty the transfer of the captured ship to a Spanish purchaser. From these circumstances he held that the acts of capture and condemnation were not mere private acts of depredation, but must be presumed to have been conducted in accordance with what the Dey conceived to be a Right under the Mohammedan Law of Nations[54]. If the Government of a State has notified to foreign Powers that it has had recourse to force, which it intends to employ in pursuance of the Law of Nations, it is immaterial against what party such force is to be directed. Foreign Powers are bound to accept such Notification, as an announcement of a state of War between the Government of that State and its adversary; in other words, they are bound to measure the acts of violence committed on both sides, if they interfere with the peace of the High Seas, by the rules which govern the relations of Nations in time of War. The Government of a State may notify to foreign States that there is a state of Tumult amongst its Subjects, whereby it has become necessary for it in the exercise of its Rights of Sovereignty to interdict certain of its ports to foreign merchants, until the tumult is appeased; and that, if foreigners should enter the interdicted ports, they will be subject to certain penalties under its territorial Law. The Notification of such a fact gives to the Government of such a State no new Rights against foreign Nations; it is simply an announce-

[54] The Helena, 4 Ch. Rob. p. 7.

ment to them that it intends to exercise its Rights of Sovereignty within its own Territory in a certain manner, and they are bound to respect its territorial Independence. But a Notification to Foreign Powers on the part of the Government of a State that it has established a Blockade of certain ports in pursuance of the Law of Nations, and that if any vessel should attempt to enter or leave any of the blockaded ports, it will be captured, and proceeded against as Prize of War, will warrant the notifying Power in exercising the Rights of a Belligerent with respect to all foreign vessels; and those Rights will not be confined to vessels which have entered its Territory, but may be exercised on the High Seas against vessels which are approaching its Territory. Under such circumstances a foreign Nation is not concerned with the justice or injustice of the War, and it is not for it, if it wishes to remain Neutral, to judge between the parties to the War, and to grant or refuse more or less to the one or the other, as it thinks its cause to be more or less just or unjust. A Nation therefore which wishes to be Neutral in such a War, must acquiesce in either party exercising the Rights of a Belligerent in regard to all foreign Nations; for it cannot concede the exercise of those Rights to one party, and refuse it to the other, without interfering in the War. Thus in the year 1835 the population of Texas rose in insurrection against the Government of Mexico, and a Civil War ensued. The Mexican President, General Santa Anna, thereupon invaded the Territory of Texas, in order to reduce the rebellious province to submission, and in the month of April 1836 fought the battle of San Jacinto, in which the army of the Government *de jure* was defeated, and the President Santa Anna taken prisoner. In the same month of April the American brig Pocket

sailed from New Orleans for the port of Brassos of St. Jago, within the limits of Texas; and when approaching her destination was captured by the armed schooner Invincible, sailing under the flag of the recently constituted Republic of Texas, on the alleged ground that she was carrying Contraband of War for the use of the Mexican army under the command of General Santa Anna. The officer in command of the United States' naval forces in the Gulf of Mexico, having heard of the capture of the brig, promptly despatched the United States' ship of War Warren to capture the Invincible, and send her into New Orleans for adjudication as a Pirate. Pursuant to these orders the Invincible was captured on 29 April with the principal part of her crew, and the vessel and men were sent into New Orleans, and delivered up to the Civil authorities, to be proceeded against as Pirates. The United States Government had however recognised the existence of a Civil War between the people of Texas and the Government of Mexico in November 1835, and the President of the United States had given notice to the Mexican Government of his intention to maintain the Neutrality of the United States. Under these circumstances, the Attorney General of the United States reported to the President, that when "a Civil War breaks out in a foreign Nation, and part of such Nation erects a distinct and separate Government, and the United States, although they do not acknowledge the Independence of the new Government, do yet recognise the existence of a Civil War, our Courts have uniformly regarded each party as a Belligerent Nation in regard to acts done *jure belli*. Such may be unlawful, when measured by the Law of Nations, or by Treaty-Stipulations; the individuals concerned in them may be treated as trespassers, and the Nation

to which they belong may be held responsible to the United States, but the parties concerned are not treated as Pirates[55]." A similar view of the juridical incidents of a Civil War has been frequently expressed by the Supreme Court of the United States. Mr. Justice Story, in delivering the judgment of that Court in a case in which the Neutrality of the United States had been violated by a Public armed vessel belonging to the Government of the United Provinces of Rio de la Plata, observed, "There is another objection urged against the admission of this vessel to the privileges and immunities of a Public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not been acknowledged as a Sovereign Independent Government by the Executive or Legislature of the United States, and therefore is not entitled to have her ships of War recognised by our Courts as National ships. We have in former cases had to express our opinion on this point. The Government of the United States has recognised the existence of a Civil War between Spain and her Colonies, and has avowed her intention to remain Neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed by us a Belligerent Nation, having, so far as concerns us, the Sovereign Rights of War, and entitled to be respected in the exercise of those Rights. We cannot interfere to the prejudice of either Belligerent without making ourselves a party to the contest, and departing from the posture of Neutrality. All captures made by each must be considered as having the same validity, and

[55] Opinions of the Attorneys General of the United States, Vol. II. p. 1065.

all the immunities, which may be claimed by Public ships in our ports under the Law of Nations, must be considered as equally the Right of each, and as such must be recognised by our Courts of Justice, until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this Court, and we see no reason to depart from it[56]."

Belligerent Right of Capture reconcilable with the Independence of Neutral Nations.

§ 240. A state of War does not give rise to any Rights on the part of Belligerent Nations in their relations with Neutral Nations, which derogate in any way from the Sovereignty of the latter. If a Belligerent cruiser captures a merchant vessel on the High Seas, it does not violate the Sovereignty of the Nation, to whose citizens the merchant vessel may belong, as property. The Rights of Sovereignty of every Nation are restricted to the limits of its Territory; and if in certain matters it exercises any Right of Sovereignty beyond the limits of its Territory, it does so under the Comity of Nations. Accordingly, if an armed ship of one Nation captures on the High Seas a merchant vessel which belongs to the Subjects of another Nation, there is neither the exercise of any Right of Sovereignty, nor the violation of any Right of Sovereignty on either side. If an armed ship is commissioned by a Nation to make War against another Nation, it is authorised by the Law of Nations to exercise all the Rights of War, in other words, the Rights of Natural Justice, applicable to the prosecution of the particular Right or the redress of the particular Wrong, which is the object of the War. Amongst the Rights of Natural Justice is the seizure of Enemy's property wherever it may be found, if it is not under

[56] The Santissima Trinidad and the St. Ander, 7 Wheaton, p. 337. The Divina Pastora, 4 Wheaton, p. 52. The United States *v.* Palmer, 3 Wheaton, p. 610. The Estrella, 4 Wheaton, p. 302. The Neustra Senora de la Caridad, 4 Wheaton, p. 497.

the protection of the Sovereignty of a Neutral Nation. But property ceases to be under the protection of the Sovereignty of a Neutral Nation, when it ceases to be within its Territory, and by parity of reason a Neutral Nation ceases to be responsible for the Neutrality of individuals, when they are beyond the limits of its Sovereignty. In the case where a Belligerent cruiser captures a merchant vessel, which is the property of the Subjects of a Neutral Power, for a breach of Neutrality, the capture is not made as of a vessel of a Neutral merchant, but as of one who, quitting his Neutrality, voluntarily arrays himself on the side of the Enemy. On this subject, to use the language of Mr. Justice Johnson, in delivering the judgment of the Supreme Court of the United States, "there appears to be a tacit Convention between the Neutral Power and the Belligerent Power, that, on the one hand, the Neutral State shall not be implicated in the misconduct of the individual; and, on the other, that the offender shall be subjected to the exercise of Belligerent Right." Accordingly, if a vessel, which is the property of a Subject of a Neutral Power, has been taken on the High Seas by a Belligerent cruiser in an act of unneutral trade, and should be brought by the captor within the jurisdiction of the Neutral Power, the situation of that ship towards the Neutral Power is precisely the same as that of any other captured Neutral, or rather the obligation of the Neutral Power to abstain from interference between the captor and the captured vessel becomes greater, inasmuch as it is purchased by a concession from the Belligerent of no slight importance to the peace of the world, and particularly of the Nation of the offending individual. On the other hand, the Belligerent Power contents itself with suppressing the unneutral commerce, and makes no

complaint to the Neutral Power, not even where a merchant vessel, which has been captured by a Belligerent cruiser, has been rescued by its crew on the High Seas, and has escaped in safety within the jurisdiction of the Neutral Power[57]."

57 The Invincible, 1 Wheaton, p. 255.

END OF PART II.

TO THE BINDER.

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